

University of Warwick institutional repository: <http://go.warwick.ac.uk/wrap>

A Thesis Submitted for the Degree of PhD at the University of Warwick

<http://go.warwick.ac.uk/wrap/3100>

This thesis is made available online and is protected by original copyright.

Please scroll down to view the document itself.

Please refer to the repository record for this item for information to help you to cite it. Our policy information is available from the repository home page.

**A Sociolinguistic Study of Communication Processes
in a Court of Law in Gaborone, Botswana**

**By
Elma Thekiso**

**A thesis submitted in partial fulfilment of the requirements
for the Degree of Doctor of Philosophy**

**University of Warwick,
Centre for English Language Teacher Education**

September 2001

CONTENTS

INTRODUCTION	1
The motivation	1
Court Discourse: Establishing the niche	2
The literature on language and the law	3
Analytical models	5
The database	7
Arrangement of the thesis	8
SECTION A: THE LOCAL AND THEORETICAL CONTEXTS	10
CHAPTER 1: The Botswana Context	11
1.1 The legal system of Botswana	11
1.2 The language policy of Botswana	14
1.3 The ethnography of the courtroom	16
1.3.1 The physical context	17
1.3.2 Status and role	18
1.4 Summary	19
CHAPTER 2: The theoretical context	21
2.1 The rationale for a sociolinguistics of law	21
2.2 Previous writing on the language of the law and courtroom discourse	23
2.3 The development of the sociolinguistics of law	29
2.4 Criticism of legal language and courtroom discourse	34
2.5 Approaches to the study of language and the law	36
2.6 Conclusion	40
SECTION B: METHODOLOGY	41
CHAPTER 3: Methods of data collection	42
3.1 Fieldwork	43
3.2 Research ethics and consideration of person anonymity	46
3.3 Description of the data	47
3.3.1 The questionnaire study	48
3.3.2 Audio-recording	49
3.3.3 Transcription of the data	52
3.4 The research questions	54

SECTION C: THE COURTROOM PROCESSES	55
CHAPTER 4 Communication processes in the courtroom	56
4.1 Introduction	56
4.2 The order of courtroom processes	58
4.3 Monologues and dialogues	63
CHAPTER 5: Administrative Processes	67
5.1 Introduction	67
5.2 Some genre analysis models	67
5.3 Mentions	73
5.3.1 Definition	73
5.3.2 Description of the data	75
5.3.3 Data analysis	75
5.3.3.1 The purposes and stages of the Mentions genre	77
5.3.3.2 The language of Mentions	80
5.3.3.3 The court context for Mentions	81
5.4 The Reading of the Charge Sheets	84
5.4.1 Description of the data	84
5.4.2 Analysis of the Charge Sheet	85
5.5 The Reading of Facts: The narrative genre	88
5.6 Conclusion	91
CHAPTER 6: Substantive Processes 1: The monologues	93
6.1 Introduction	93
6.2 The place of narrative in courtroom communication	94
6.2.1 Stages in the persuasion process	97
6.3 The prosecution and defense strategies of persuasion	100
6.4 Courtroom submissions	103
6.4.1 Persuading the judge	109
6.4.2 Analysis of submissions	114
6.4.2.1 Linguistic features of submissions	114
6.4.2.2 Submissions as a genre of discourse	117
6.4.2.3 Social purpose and textual structure	118
6.4.2.4 Textual structure	118
6.5 Judgements as a courtroom genre	122
6.5.1 The generic structure of judgements	124
6.5.2 Purposes and functions of each stage of the judicial decision genre	126
6.6 Analysis of judgements	128
6.6.1 The language of the judgement	133
6.7 Conclusion	135
CHAPTER 7: Substantive Processes 2: The dialogues	136
7.1 The model	136
7.1.1 The transaction	138
7.1.2 Acts	140
7.1.3 Moves	145
7.1.4 The exchange	147
7.1.4.1 Types of exchanges	153
7.2 Routine in daily work situations	156

7.3 Types of testimony in direct examinations: Narrative and Fragmented	161
7.4 Analysis of Cross-Examinations	168
7.5 Power in the tenor of examination discourse	172
7.6 Control and resistance to control	177
7.7 Summary	180
 SECTION D: BILINGUALISM IN THE COURTROOM	 182
Introduction	183
 CHAPTER 8 Code-switching	 183
8.1 Previous writing on bilingualism and code-switching	183
8.1.2 Code-switching defined	184
8.1.3 Analytical models of code-switching	186
8.1.3.1 The situational approach	186
8.1.3.2 The markedness approach	189
8.1.3.3 The sequential approach	190
8.2 My model	191
8.3 The courtroom context for bilingualism	194
8.4 Analysis of bilingual courtroom data	195
8.4.1 Who speaks what language?	197
8.4.2 The language of the presiding officer	202
8.4.3 Functions and types of code-switching	205
8.4.4 A developmental perspective on code-switching	211
8.4.5 Similarities and differences between the code-switching of participants	213
8.4.6 Some cross tabulation	219
Summary	225
 CHAPTER 9 Courtroom Interpreting	 226
9.1 Description of the data: dialogues and monologues	226
9.2 Legislation and statutory provision for bilingualism in the courtroom	227
9.3 Previous writing on courtroom interpreting	229
9.3.1 Effects of interpretation on evidence	232
9.3.2 Educating the interpreter	236
9.4 Analysis of interpreted proceedings in this study	238
9.4.1 Interpreted administrative processes	239
9.4.1.1 Two languages in the reading of charge sheets	240
9.4.1.2 Two languages in the readings of facts	243
9.4.1.3 Interpreted substantive processes: the dialogues of examinations	247
9.4.1.4 Changes in evidence introduced by interpreters in this courtroom	251
9.5 Conclusion	253
 SECTION E: DISCUSSION	 257
 CHAPTER 10 Themes: Linguistic analyses and sociological interpretations	 258
10.1 Linguistic analyses	259
10.1.1 Legal texts and their contexts of situation	261
10.1.2 Discourse Analysis: The IRF model and power	263
10.1.3 Narrative analysis	266
10.2 Sociological interpretations: themes	269
10.3 Conclusion	279

10.4 Summary of the thesis	280
CHAPTER 11 Conclusions and Implications	282
11.1 Achievements and limitations of the study	282
11.2 Some highlights of the study	283
 Reference List	
 Figures	
Figure 1 Courtroom Genres	26
Figure 2 Professional Genres	27
 Tables	
Table 1 Characteristics of the questionnaire study sample: Prosecutors	48
Table 2 Characteristics of the questionnaire study: Lawyers	49
Table 3 The Data	51
Table 4 The courtroom Processes	58
Table 4 Botswana courtroom discourse types	65
Table 6 Administrative and substantive courtroom processes	66
Table 7 Realisations of the self-introductory stage	76
Table 8 Stages of the submissions genre	121
Table 9 Acts in courtroom discourse	144
Table 10 Moves in the direct examination	146
Table 11 Sequence in the Direct Examination	153
Table 12 IRF Structure of Cross Examinations	171
Table 13 Grosjean (1982) Factors influencing language choice	192
Table 14 Language choices and functions	204
 Bibliography	 283
 Appendices	
Appendix 1 Mentions	297
Appendix 2 Direct Examinations	303
Appendix 3 Cross Examinations	319
Appendix 4 Submissions	328
Appendix 5 Judgements	333
Appendix 6 Readings of Facts	335
Appendix 7 Charge Sheets	341
Appendix 8 Questions put to lawyers and police prosecutors	346

Acknowledgements

For Ogaufi with love and gratitude for her courage and understanding

Many thanks to my supervisors Dr Sheena Gardner and Dr Julia Khan for their hard work

Thanks also to all the people who aided this study by giving me access to their institutions to collect the data needed.

Finally many thanks to colleagues at The Warwick University Centre for English Language Teacher Education who made my stay in England pleasant in many ways.

Abstract

The overarching discipline of the study is the sociolinguistics of law in which the analytical methods of discourse, genre and narrative analysis are brought together in the enterprise of describing language in its social context. The issues addressed in this study relate to communication processes in a court of law in Gaborone, Botswana. These have been identified as issues relating to the various stages of the trial process that some writers have labelled sub-genres of the courtroom genre and some have simply labelled discourses. The processes typical to the Botswana courtroom are the administrative processes of Mentions Reading of Charge Sheets and Readings of Facts and the substantive processes of Direct and Cross Examinations, Submissions and Judgements.

The study also includes the description of the bilingual nature of the Botswana courtroom including code switching and courtroom interpreting. The views and awareness of the legal practitioners – police prosecutors and lawyers- on and of the uses of language in the courtroom were sought and tested by a short questionnaire. These are cross-referred with observations and recordings of the court's proceedings with the aim of revealing the nature of bilingualism in this court.

Many studies have described and critiqued different aspects of the trial such as courtroom questioning and jury summations, but few have attempted to describe the trial as a whole as this study has done. This broad focus has enabled the perception of the trial as a site for interlocking discourses, which together bring about the outcomes of trials. It has found out, for example, that while some processes are, ordinarily, unacceptably coercive of witness, like cross examinations, some are empowering, for instance, direct examinations. In which witnesses are allowed longer turns at talk where they give narrative accounts. The data comprises forty hour of recordings transcribed into texts comprising several examples of each of the stages of the trial.

INTRODUCTION

The motivation

Two factors motivated the pursuit of this study. The first factor is two pronged – my interest in the study of the functions of language in society and the interrelationships of language and society (sociolinguistics) and the functions of law in society (sociological jurisprudence). The former I have training in and the latter interest has developed over the years since I left my first degree in English Literature and Sociology. The topic of the language of the law and courtroom discourse thus allows a perfect meeting place between sociolinguistics and sociological jurisprudence in the study of ‘how language relates to the function of law in society’ (Danet 1971 p.447). The second factor is the logistics of studying the discourse of some institution or other. The area of courtroom discourse is particularly accessible as courts are public places and anyone, researcher or casual observer, can visit any court. However an even better reason for easy access to the courts in Botswana is the legislation passed, since I embarked on this study, that courtroom proceedings could be tape-recorded, which provided me a very good possibility of collecting authentic and complete natural language data. The initial hunch that there could be a topic worthy of study in the language of the Botswana courtroom developed out of a number of casual visits to the courts. One thing that came out powerfully from these casual observations was the complexity of communication in the courtroom. The Botswana context, where bilingualism in English and Setswana is the

norm for most educated people i.e. those who have gone through the Botswana education system, is one that still needs to be described. There is an observable neglect of issues of language in Botswana when in fact the situation is very rich in language data. It was this consciousness of the theoretical possibilities of the language situation of Botswana that led me to the decision to study at least one of the many domains of languages in Botswana. Hence the focus on communication processes, whether they involve the use of English only or the use of different languages, mainly Setswana and English.

Court Discourse: Establishing the niche

Court discourse is a very broad discourse type (Harris 1988). In western countries court discourse takes place in physical contexts that include special buildings and very conventionalised modes of dress as well as conventionalised modes of behaviour. The social relations in courtrooms involve highly asymmetrical distribution of power where power is 'invested in certain individuals who ... represent the force of law' (Harris 1988 p. 96). The Botswana court is similar to many other courts around the world, both in its physical layout and in its overall purpose and the statuses and roles of participants within the courtroom. This study of courtroom discourse in a Botswana magistrate's court aims to study the part language plays in these interpersonal encounters.

There is a wide range of types of court around the world with different functions and different personnel with a basic distinction between civil and criminal courts. This study of communication processes in a court of law is based in a magistrate's court, and the focus is on its criminal proceedings. The aim of the study is to explicate the communication processes of this court using methods of analysis selected for their power to give insight into these processes.

One distinguishing characteristic of this study is to be found both in the type and level of court chosen as the type most common to the Botswana context - the magistrate's court. O'Barr (1982) and associates studied 'the language of litigants and judges in Small Claims Courts focussing on 14 courtrooms in six cities, where, 'by expanding their sample beyond two judges or communities, they are able to give a feeling for broader patterns that emerge in different settings' (Mertz 1992, p. 428). My study differs in being concentrated in the proceedings of a single courtroom for comprehensive, qualitative analysis of the genre in a specified context.

The literature on language and the law

The study of the relationship between language and the law and of legal language has its beginnings in the 1970s in the USA with the launching by the Law and Social Science Program of National Science Foundation, of the 'empirical study of language in American legal settings.' This Organisation 'funded four interdisciplinary studies; two on questioning in American

courtrooms conducted by O'Barr, Conley and Lind, and two on comprehensibility of pattern jury instructions, led by Sales, Elwork and Alfini.' (Danet 1990 p. 941).

Danet (1990) makes an observation, which echoes my own observations about the foci of studies of communication processes in the courtroom. She says that in the last fifteen years of studies after these studies were funded, 'research has continued to focus on the nature and consequences of communication processes in dispute processing and on the comprehensibility of legal language to lay persons.' It is my observation that focus on 'problems' of communication (consequences and comprehensibility to lay persons), has produced very highly critical stances on the part of researchers who continue to focus on selected aspects of the trial rather than on communication processes in the whole trial process. My study attempts to bring caution to the enterprise of describing communication processes in law courts and to show how the whole trial is made up of discourses that interconnect to bring about the outcomes of trials. I do not only focus on certain kinds of communication such as questioning in court or jury summations, which are patently problematic, but on all communication processes.

This broader focus reflects a position that is not entirely unique in the study of the discourses of the adversarial system of justice. Other studies such as those Carlen (1976) and Atkinson and Drew (1979) and Harris (1980) have discussed the whole trial process albeit from a different perspectives.

Carlen's is probably a precursor to the critical school that focuses on the problematic relationship between 'professional procedures and commonsense, everyday ones' (Atkinson and Drew 1979). Atkinson and Drew's study looks at courtroom interaction from an ethno methodological approach they describe several courtroom processes such as examinations, and openings of hearings and compare them with similar processes in everyday discourses such as those of conversation. Harris's study focuses on the formal discourse of the courtroom from a discourse analytic perspective and describes the processes of the courtroom using Sinclair and Coulthard's (1975) model of classroom discourse. My broader focus (involving study of all courtroom processes) means that my methodology is as eclectic as there are diverse courtroom discourses.

Analytical models

In her discussion of types of representation of the structures of particular genres, Harris (1988 p.99) lists four types as linear, networks and flow diagrams, and hierarchical types of representation. She argues the merits and limitations of each type. For example the linear types are 'criticised on the grounds that they do not allow one to take count of enough similarities and differences' between genres and 'a dynamic interactive component is difficult to build into such models.' On the other hand, 'the length and complexity of a court case is such that any flow diagram would be extremely inelegant and unwieldy.' It seems to me that courtroom discourse will be better described by a combination of models, each making up for the

inadequacy of the other. This seems possible with applying the linear – ‘staged’ model of Martin and Rothery (1987) for monologic discourse and Sinclair and Coulthard’s (1975) hierarchical model for dialogic discourse. In argument for this choice, I quote Harris (1988) who argues that ‘linear descriptive models do not easily allow for the interactive dimension,’ and suggests that ‘we need a separate layer of structure to account for the interactive dimension in most complex generic types which involve dialogic discourse’ (p.108). She says in conclusion to her discussion of models of discourse description that, ‘monologic and dialogic discourse appear to require somewhat different types of treatment.’ A further reason for choosing different models of analysis of monologues and dialogues is that genre analysis, the model selected for analysis of monologues, operates at a different level from that of exchange structure. So Sinclair and Coulthard’s (1975) is chosen over Martin (1973) for analysing Exchanges for the reasons that (a) it is more detailed while Martin conflates acts and moves and (b) the exchanges are proscribed – like classroom talk. Therefore Martin is better for analysis of casual conversation. The closing speeches of counsel and judgements by magistrate make necessary yet another model of discourse analysis, that of narratives as ways of organising arguments. It is the nature of ‘fact oriented disputing’ (Danet 1979) to involve advocacy and argument and the importance of persuasion in the trial processes cannot be overlooked.

This study focuses on the courtroom genre, which is realised in the trial process as a whole. Bhatia (1993) and Harris (1988) refer to the stages of

the trial as sub-genres and Jackson (1988) calls them simply, discourses. He speaks of a multiplicity of discourses within the trial and says that the trial is a site for a set of discourses – counsel/witness, counsel/counsel, counsel/judge, and judge/defendant etc (p. 35). In this study these discourses are called communication processes and they are introduced and discussed, in their order of appearance in the trial, in Section C Chapter 4. The prosecutor/magistrate communication processes are those of Mentions and the counsel/witness communication happens in the Examinations; the counsel/counsel and counsel/magistrate communication processes are those of Submissions; the judge/defendant as well as judge/counsel communication processes are those of the reading of Judgements and the passing of sentences. The nature of these discourses or communication processes will be elaborated in Chapter 4.

An important characteristic of the communication processes in this courtroom is its bilinguality. So the methodology expands to include analysis of bilingual discourse. This is done in chapter 8 of the thesis, after all the discussion of the monolingual discourses. Chapter 10 consolidates all these methodologies and the themes that have been revealed in the data using these methods.

The database

The data is made up of texts collected by tape-recording of proceedings of a magistrate's court in Gaborone, Botswana. This data was collected in a

period of four months between July to September 1999 and January to February of 2000. It must be made clear, however, that the data does not come from one complete trial and does not necessarily need to be so. Instead various stages of the trial are compounded from recordings of different trials at their various stages. The data was transcribed and divided up into texts instantiating each courtroom communication process or each type of courtroom discourse. We therefore have data relating to Mentions, Examinations, Submissions and Judgements as well as Charge Sheets and Facts of Cases. The data is analysed to reveal answers to three research questions, which will be discussed in Section B. the methodology section.

Arrangement of the thesis

The thesis is arranged in five sections and eleven chapters. The substantive chapters of the thesis, those of administrative and substantive monologues and dialogues and bilingualism and courtroom interpreting are each preceded by a brief discussion of previous writing on the element in the chapter. Section 1 is dedicated to the description of the context of the study presented in two chapters, Chapter 1 focuses on the context of Botswana and 2 on the theoretical context. In Section B, I present the methodology of the study where in chapter 3 I describe the methods of data collection and the description of the data. Section C enters into the main body of the thesis presenting the courtroom processes and analysing the data that represents these processes. It contains four chapters being, Chapter 4, The Courtroom

processes; Chapter 5, Administrative Processes; Chapters 6 and 7

Substantive Processes including monologues and dialogues respectively.

The overall linguistic context of the courtroom of this study is bilingual. So Section D addresses this aspect of language use and analyses and describes the bilingual nature of the courtroom, which is also part of the main body of the thesis. Here again the section is broken down into two chapters. Chapter 8 discusses the alternation of languages in the courtroom including code switching and chapter 9 focuses on courtroom interpreting. Here again the interesting thing that this section reveals is the social dynamics that underpin language choices. This bilingualism is contained in the same texts that have been used to study discourse and genre. The data of this study is, therefore, very rich in linguistic meaning.

The final section, Section E, presents the discussion of themes and interrelationships of the methodologies of the study in chapter 10 and the conclusions of the study in Chapter 11. The conclusion includes a final summary of the answers to the research questions and suggests some applications of the findings of the study and the need for further research.

**SECTION A: THE LOCAL AND THEORETICAL CONTEXTS OF THE
STUDY OF LANGUAGE AND THE LAW**

CHAPTER 1: The Botswana Context

1.1 The legal system of Botswana

This study of communication processes in a court of law is situated in a magistrate's court in Gaborone in Botswana. The laws of Botswana as read from the Criminal Procedure and Evidence Act and the Magistrates' Courts Act recognise two levels of court in Botswana. These are the magistrates' Courts and The High Court. Part II, Section 1 of the Magistrates' Courts Act Chapter 04:04, establishing the Magistrates Courts, briefly states that: 'There shall be courts subordinate to the High Court to be known as magistrates' courts presided over by magistrates appointed for the purposes of this Act.' (04:233) The Criminal Procedure and Evidence Act, relating these courts to each other stipulates in Part II Sections 4, 5, and 6 that 'The High Court as constituted by the Constitution of Botswana shall have jurisdiction in respect of the trial of all persons charged on indictment with committing any offence within Botswana' and 'Magistrates' courts shall, subject to provisions of this Act, have jurisdiction in all cases of offences committed within their several areas of jurisdiction being as described in the laws relating to such jurisdiction of such courts.' Section 6 (3) stipulates that, 'the Superior court is the High Court.' These cryptic laws do not then distinguish exactly what cases go to the High Court but in reality it is partly a court of appeal. The areas of jurisdiction of magistrates' courts are called magisterial districts established under the Administrative Districts Acts.

There is another type of court whose level is vaguer. These courts are called customary courts. They are presided over by Chiefs in all the villages of Botswana.

The magistrates' courts are modern courts in the sense of operating with a western type legal system inherited from the British as the former authority over the then Bechuanaland Protectorate. The legal system of Botswana has a rather mixed history. Interviewing a law professor at the University of Botswana about the nature of the Botswana legal system, I first noted that there are at least two labels commonly used in reference to the legal system of Botswana. These are 'Roman-Dutch and 'Common Law.' I asked for clarification on the use of these terms.

Respondent: First of all, Botswana really runs a mixed legal system... At worst there are four legal systems, at best there are two. First there are the customary courts. The other element is that Botswana being a member of the community of nations, some of the declarations, treaties and conventions that are passed by the international community, either the OAU or the UN are binding to Botswana. The other side, especially in cases of criminal law, the bulk of the laws are inherited from the British code. (Interview 2, January 2000)

So we can see here that there is the customary law and international law. But the crux, for the purposes of distinguishing the legal system under which the magistrates' court operate is the Common Law and the Roman-Dutch law whose history I shall now outline. As the law lecturer respondent outlined its history, the penal code of Botswana was introduced in 1964, a year before the declaration of independence. Before that the country used the Roman-Dutch law. The Roman-Dutch law has a long history. It originated under the

Roman Empire. When the empire collapsed, some parts of the world that were under the empire continued to operate that law. Part of that empire was what is today called Holland. The legal system of Holland merged with the law of the former imperial power and this marriage is what is now called Roman-Dutch. In the 1660s to the 1700s, the Dutch East India Company travelled round the south coast of Africa and established a base for trade there. When Botswana became part of the British Empire, in 1891, the British Empire did not want to make it a colony as such, so they made it a protectorate to be administered by the British High Commission that was based in South Africa and because they had no intention to rule it, they did not bother to extend their legal system. They simply told the High Commissioner in Cape Town to look after the protectorate and apply the same legal system that is used in South Africa. That system was the Roman-Dutch brought to the Cape by the Dutch East India Company. So whatever laws passed in the Botswana parliament now has the background of Roman-Dutch. It is also Common Law in the sense that it is common to the people and it is a mixture of Roman-Dutch with customary laws which are laws indigenous to Botswana.

The legal system that has influenced courtroom practice in magistrates' courts is the adversary system of adjudication inherited from Roman-Dutch and British Common Law. Maley (1994 p.320) quotes a judge comparing the common law adversarial system and the European inquisitorial system as saying:

The essential difference between the two systems – there are many incidental ones- is apparent from their names: the one is a trial by strength and the other is inquiry. The question of the first is: Are the shoulders of the party on whom the burden of proof rests strong enough to carry and discharge it? In the second the question is: What is the truth of the matter? In the first, the judge and the jury do not pose the questions or seek answers, they use such material as put before them, but they have no responsibility to see that it is complete. In the second, the judge is in control of the inquiry from the start; he will, of course, permit the parties to make their cases and rely on them to do so, but it is for him to say what he wants to know.

In explanation of the modes of discourse within these two systems, Danet (1979 p.514) has this to say:

Whereas the modern inquisitorial model combines questioning by the judge with relative freedom of the witnesses to tell their stories in open ended narrative style, the adversary model requires tight control of questioning so that claims are generally only expressed as answers to very specific questions. Lawyers may try to persuade the jury or the judge only in opening and closing statements.

These two quotations serve to indicate the type of discourses we shall find described in the rest of this thesis. These are discourses possible only in a particular legal system with its characteristic rules of evidence i.e. the common law adversary system.

1.2 The language policy of Botswana

We start again by reference to the laws of Botswana. The Magistrates' Courts Act Chapter 04:04 Part I section 5 (1) stipulates that:

The language to be employed in a court shall be English and the evidence and all records of proceedings in the court shall be in that language.

(2) If any of the parties or witnesses in a proceeding before the court does not understand the English language, then the proceedings shall be interpreted from English into the language understood by the parties or the witnesses concerned, as the case may be and *vice versa*.

This language rule is as it is because of the general language policy of Botswana. Botswana is a multilingual country. Nyati-Ramohobo (1991 p.1) quotes the Botswana Language Project as identifying at least twenty-two languages but she identifies eleven languages. And states that 'the number of languages varies from linguist to linguist depending on what is regarded as a language and what as a dialect' (p.2). But Botswana is generally regarded as a monolingual country because the majority of the population, about 80%, speak Setswana while other languages are spoken by small populations. The Botswana government has promoted bilingualism in Setswana and English since independence in 1965. English is promoted as an Official language and Setswana as a National language. This means that English is the language of education, business and the media. As the media develop and with the introduction of a national television, the existence of other languages becomes more visible, for example some newspapers now also write in Ikalanga, the language of the largest minority, and part of the Bible has now been translated in to Ikalanga. Although speakers are free to use their languages at any time, even at work in offices, English is the language of official, written communication. English is, therefore, the language of modern law making in parliament and in the High Court and Magistrates' Courts. The indigenous courts, called customary courts, however, operate in indigenous languages.

An important element in this language context is the language knowledge of the principal participants in the courtroom, that is lawyers, police prosecutors and magistrates. In the early years of independence, professionals in most institutions, including higher education and the law courts were expatriates who could only function in Botswana in English. It is not difficult, therefore, to understand why the constitution of the magistrates' courts has the language clause it has. But today, some thirty-five years after independence, there are hundreds (Botswana has a very small population, not exceeding a million in the last census) of Setswana speaking lawyers and magistrates. These are people with a high level of education and who, being products of the English-using higher education, are proficient speakers of English. But these bilinguals now share mother tongues with the many people who appear in court.

Preliminary observation of one magistrate's court revealed that this language knowledge has some implications for the operation of the courts. For example, although the constitution stipulates that the language of the magistrates' court is English, the language situation in this court is seen to be, naturally, more complex. There is an interesting alternation of languages in the courtroom, which will be described in Section D.

1.3 The ethnography of the courtroom

Four months of data collection by tape recording of the proceedings of the court under study enabled me to both record the language data that is the

subject of this sociolinguistic analysis of communication processes in a court of law and to do some observation of the courtroom in its day-to-day business. I was allowed to sit with the court clerk at the front of the courtroom, from which vantage point I was able to make observations of an ethnographic type, that is, of the total context of the data I was collecting. This context includes the physical layout of the courtroom, the statuses and roles of various participants in the courtroom and other important contextual elements like the behaviour and atmosphere of the courtroom. I recorded these in my field notes.

1.3.1 The physical context

The courtroom as a work place is an important aspect of the setting. It is quite modern in its architecture and building plan. There are four chambers abreast of each other. Inside the walls are panelled with solid brown wood and the furnishings are solid brown wood. At the head of the courtroom is the magistrate's chair with its surrounding of wood. It is placed higher than the rest of the main hall of the courtroom. On one side of the magistrate's chair, to the right and placed slightly lower, is the dock in a wooden enclosure and on the other side is the witness box. The court clerk-cum-interpreter sits at a table in front of and below the magistrate's seat. And the prosecutors and counsel sit at a table directly facing the magistrate. The audience and litigants sit in the main body of the courtroom on solid wood fixed benches with backrests. I suspect this is the standard plan of

courtrooms the world round. The courtroom is a very modern business room and inspires respect.

1.3.2 Status and role

A distinguishing characteristic of the courtroom environment is the mode of dress of the participants. Prosecutors are formally dressed in their police uniforms. Counsel and magistrates are also always formally dressed. In fact this standard of presentability seems very important as I heard one of the magistrates, a woman, several times enjoining the prosecutors to make sure that their witnesses are properly dressed and at one session she asked the witness in the box to button up his shirt. This formal dress is an element of the statuses and roles of the courtroom participants.

The physical set up of the room just described suggests that participants are not of equal status. The raised position of the magistrate singles him or her out as the most important presence. His or her status is further reinforced by the attitudes of deference that are revealed in the forms of address such as 'Your Worship' and reference to the court as 'honourable.' This respect for the magistrate seems to be generally accepted by everybody in the courtroom. This characteristic of the courtroom verbal and non-verbal behaviour has been recognised by various researchers of courtroom discourse. For instance, Walker (1987 p.58) discussing the basis of this power as socio-cultural, explains that 'as institutions for dispute resolution evolve, certain members of society are sanctioned by the group as authorised

participants whose role, if not persons, command respect. The general theory that sees this position of the magistrate as generally accepted by all in the courtroom is called 'collaborative-consensus' 'involving a situation where one of the participants is clearly in control of the discourse and the others do not apparently resist the control' (Harris 1980 p.59). Power relations in the courtroom are a phenomenon that comes out very clearly in the analysis of linguistic data of courtrooms including this one.

The respect for the court is also very strongly apparent in the manner of the participants. It was my initial impression that participants bow to the magistrate on leave-taking while the court in progress. This impression was subsequently corrected on closer observation of this phenomenon. Bowing seems to be a practice engaged in by all participants in the courtroom, including the magistrate. Therefore bowing is directed to the court not to the magistrate. This is a culture of the courtroom. Is also imprinted in the verbal behaviour of the participants who use terms of address like 'If it please that court,' or 'as the court pleases.' These imbue the courtroom and court processes with a certain high esteem. The explanation for this reification of courtroom processes seems to me to arise from the need to emphasise that decisions made in the courtroom have been arrived at with due seriousness and through due process.

1.4 Summary

The foregoing discussion of the legal system of Botswana, the language policy of Botswana and the ethnography of the courtroom serve to elucidate the context of this study of courtroom processes in a Botswana magistrate's court. The courtroom discourse takes place in the context of an adversary system of justice as described and the official language of the court is English. This study suggests that the situation of language use in the courtroom in Botswana is itself complex and is worthy of study.

CHAPTER 2: The theoretical context of the study of communication processes in a courtroom

2.1 The rationale for a sociolinguistics of law

This study of communication processes in a court of law is located in the broad framework of sociolinguistics on the one hand, and sociological jurisprudence - the study of how law functions in society - on the other hand. The topic straddles these two disciplines and can be termed the sociolinguistics of law, whose aim is, as Danet (1979 p.447) puts it, 'to study how language relates to the function of law in society;' which I see as a perfect merger of sociolinguistics and sociological jurisprudence. The narrower focus of this study is to explore the social underpinnings of legal discourse. The choice of the legal profession as a site for the study of language is seen particularly interesting, as language is indeed germane to law. That words and language are central to the practice of law is an observation made by many studies of legal processes in different cultures. For example, Frake (1969 p.108) in (O'Barr 1981 p.388) makes the observation about the Phillipino people he studied in the Philippines, that:

The Yakan legal system is manifest almost exclusively in one kind of behaviour, talk. Consequently, the ethnographer's record of observation of litigation is a linguistic record, and the legal system a code for talking, a linguistic code.

This is as true for the Yakan as it is for any western legal system. For example, Philbrick (1949 p. vi) analysing the forensic style among English speaking lawyers declares that, 'lawyers are students of language by

profession,’ (O’Barr 1981 p.388). Crystal (1997 p.390) points out that, ‘whether the legal domain is government legislation, the courtroom or other documentation like contracts, conveyances and other regulations by law, we are faced with one fundamental principle, that the words of the law are in fact the law.’ So bound up with each other are language and law that Danet (1979 p.448) describes the relationship in these strong terms: ‘in a most basic sense the law would not exist without language.’ She makes the comparison between language and the law and language and medical practice that ‘to practise medicine is primarily (though not exclusively) to work with physical substances, to relate to human beings as physical objects. To practise law on the other hand is to relate to human beings as social beings, as language animals.’

Mertz (1992 p.423) asserts that ‘the legal arena affords a student of language an exciting locus for examining the relationship between language and power,’ and that ‘language functioning is no small part of the way law achieves its results.’ The rationale of this analysis is to be seen in the light of a growing interest in both sociolinguistics and in the study of language in legal processes such as that described by Maley (1994). Writing an overview of the field, Maley (1994) observes that, ‘the last twenty years have seen an efflorescence of interest in the language of law from linguists, sociolinguists, ethnographers, discourse analysts, ethnomethodologists and semioticians.’ And that, ‘as a result of these analyses and critiques, a great deal of legal language has been described and explained.

This thesis is an attempt to make a contribution to the growing literature by presenting data from, and analysis of, yet another context, that of Botswana. The linguistic tools and models of analysis adopted lie within sociolinguistics and are those of discourse, genre narrative as well as bilingual discourse analysis, in which texts are described in their 'contexts of situation,' and social and sociological themes are drawn and are interpretation made.

2.2 Previous writing on the language of the law and analysis of courtroom discourse

I have outlined the relationship between language and the law. I turn now to the study of the language of law and courtroom discourse. I shall first use the literature to define key concepts in the study of contextualised language communication. Then I shall summarise relevant previous writing on the topic of courtroom communication, discourse or genre including the methodologies employed and major themes arising from these studies. Finally criticisms of legal language and courtroom discourse will be surveyed.

There are a number of terms used in the literature on courtroom communication. These are the terms discourse, genre, communication processes and narrative. The term discourse is of course a familiar one as it is even used to refer to a particular discipline within linguistics, that of Discourse Analysis. Stubbs (1983) in his 'programmatic introduction' to his

book, *Discourse Analysis*, begins by noting that ‘*discourse analysis* is a very ambiguous term.’ He uses it in his book to ‘refer mainly to linguistic analysis of naturally occurring, connected spoken or written discourse. Roughly speaking it attempts to study the organisation of language above the sentence or above the clause, and therefore to study larger linguistic units such as conversational exchanges or written texts.’ (p.1) As this definition serves my purposes in this study, I shall go no further with arguments regarding what discourse analysis is and what it is not. This allows me to go straight on to the more relevant discussion of terminology in my area of study. I wish to relate three terms, which will together characterise and inform my area of inquiry. These are the terms discourse, genre, communication processes and narrative. All four are used regularly in the literature on courtroom discourse and form the characteristic academic genre relating to the discussion of language in its context of use.

Jackson (1988) and Sarangi and Slembrouck (1996), use the term ‘discourse.’ First Sarangi and Slembrouck (1996 p.12), maintain that ‘central to critical linguistics approach is the notion of discourse’ and that ‘discourse can be looked at as text, as processes of text production and interpretation.’ (to be developed later). Another writer who uses the term discourse in relation to the courtroom is Jackson (1988). He says that his argument ‘supports if it does not independently establish the existence of a multiplicity of discourses within the trial’ (p.35). So, courtroom discourse is not to be seen as one, monolithic discourse as, indeed, it is a set of discourses, which in my study are individually analysed and described by a

number of models. Courtroom discourse belongs to that type of professional discourse known as institutional discourse i.e. talk between expert representing some authority, and a layman, (Gunnarson 1997 p. 7). Some of these discourses are those between various counsel and witnesses and defendants within trials and in lawyer client consultation out of court, and, in my data, also the reading of charge sheets (by court clerks) and facts of the case (by prosecutors) to the litigants.

Another term 'genre' forms one of the foci of this study. The earliest use of the term genre in discussing law is that of Danet (1979) who cites Hymes as listing genre as the last letter of his acronym SPEAKING. Here genres are defined as 'communicative forms recognised by a society, typically identified by the labels that society gives them. Categories like poem, novel, proverb or riddle are all genres of language use. And she also points out, like Jackson (1988) does of discourses, that there may be several genres in a trial: opening statements, testimony, closing statements, the judge's charge to the jury.' Maley (1994 p. 18) suggests that there are four major situational contexts of the legal genre viz. judicial discourse, courtroom discourse, the discourse of legal documents and the discourse of lawyer/client consultation. There are probably more legal discourse situations than Maley recognises. Bhatia (1987 p.227) shows these in his tree diagram of the genres of the language of the law. First he distinguishes between the spoken and the written medium and then further, these genres are distinguished by the setting in which they occur being the pedagogical, the academic and the

professional settings. As my interest lies within the spoken medium, I shall outline this branch of the tree to contextualise the courtroom genres.

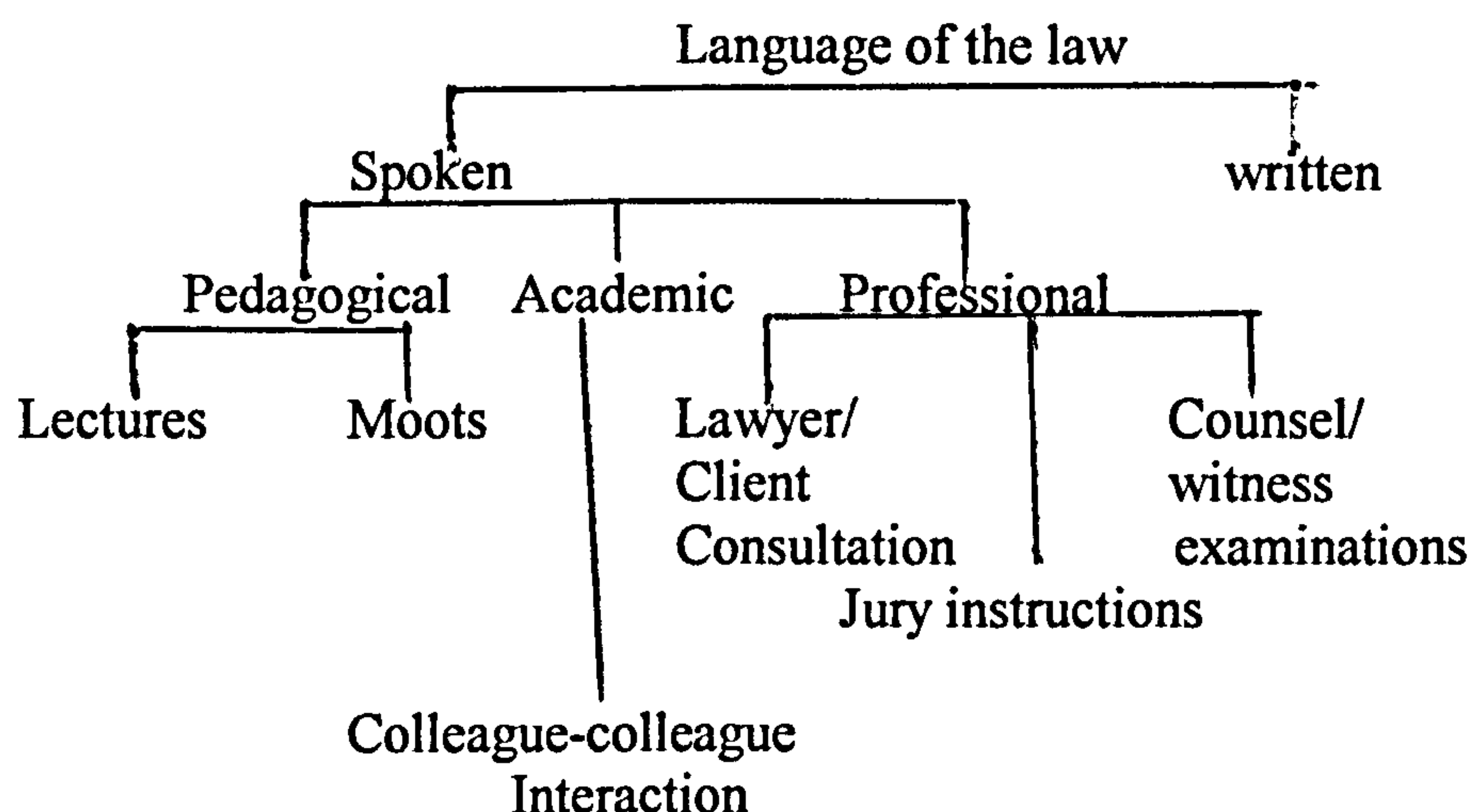


Figure 2.1 (Bhatia 1987 p.227) Genres of legal language

This diagram shows clearly that there are several genres of the language of law depending on the settings in which they occur. Both Maley (1994) and Bhatia (1987), however, fail to characterise all the genres of legal practice. For instance, Maley mentions and goes on to describe the courtroom genre but fails to realise that this is itself a broad category including several distinct genres. Bhatia on the other hand tries to expand the discussion to include many but still not all of the possible legal genres in the professional setting. Hence this study attempts to rectify this by expanding both Bhatia's professional setting of the legal genres and by differentiating Maley's courtroom genre. The professional branch of the tree diagram then looks something like this:

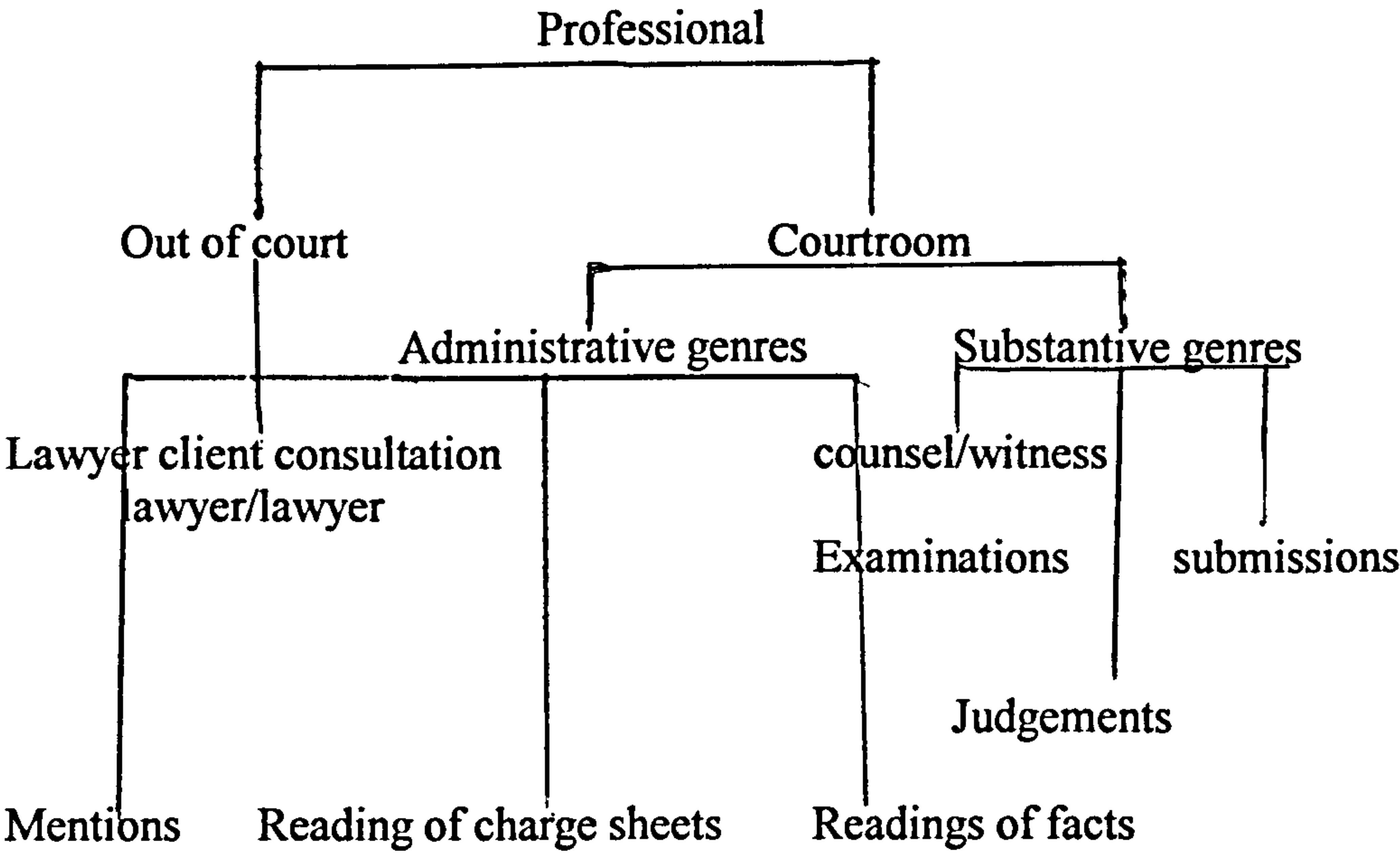


Figure 2.2 Spoken professional genres of legal language in a Botswana courtroom.

The third term that is in use in discourse analysis circles is ‘communication processes.’ Gumperz (1982) uses this term in the context of inter-group communication in modern industrial complex society. He argues urbanisation and its concomitant bureaucratisation of social life has resulted in complex societal formations like industrial institutions, union organisations, social welfare or health services which impinge on the day-to-day lives of individuals who themselves are members of various social groupings such as gender, ethnic groups and class. When individual members of these various groups enter into interaction with each other as they are bound to, they bring to the encounters ‘styles of speaking which, even though they served them well in homes and peer group situations, are likely to be misunderstood in inter-group settings’ (Gumperz 1982 p.3), such as those of

job interviews, counselling, government, committee negotiations, courtroom interrogation and formal hearings. It is these communication problems that make it necessary to study communication and its effects on people's lives. Gumperz argues that we cannot study communication in isolation but we must focus on what communication 'does: how it constrains evaluation and decision-making, not merely how it is structured.' This statement is apposite to my study of communication processes in a court of law in which the aim is to evaluate professional discourse and its 'functionality and ability to promote optimal social and personal satisfaction to parties involved' (Gunnarson 1997 p. 7), and to study how 'professional and institutional usages enable us to illuminate issues of social concern' (Gibbons 1994 p.x). In the courtroom language communication is especially important as it has significant consequences on individuals. It is therefore necessary to observe the communication processes here in order to characterise courtroom discourse.

The fourth and final term used in studies of courtroom discourse is narrative. This term was first introduced by Bennet and Fieldman (1981) who reported that their 'search for the underlying basis of justice and judgement in American criminal trials produced an interesting conclusion: the criminal trial is organised around storytelling' (p.93). Jackson (1988) makes a criticism of this theory from a semiotic approach, but the Yale Law School symposium entrenched the theory of the centrality of narrative to persuasion in the courtroom. For narrative analysis in relation to organisations see (Boje 1991, Mumby 1993, Clegg 1993, Witten 1993). Cortazzi (1994) is a state of

the art article on narrative analysis and Cortazzi (1993), uses narrative analysis as an analytical tool in the study of teachers' staff-room discourse. Georgapoulou and Goutsos (2000) in their effort to make a distinction between narrative and non-narrative modes, give a very good critique of the traditional conceptions of the primacy of the narrative genre. All these studies of narrative are made use of in my analysis of narrative as the organising principle of the trial in Chapters 5, 6, and 7.

2.3 The development of the sociolinguistics of law

A presentation of previous writing on the topic of language and the law and courtroom discourse must indicate the conscientiousness of scholars in this field in periodically reviewing the growing literature in the field. Indeed there are at least six reviews carried out in the period beginning in the late seventies to the middle of the nineties. The first two reviews were made by Danet (1979) and (1980), These were followed by O'Barr (1981) then Bhatia (1987b) and Danet again (1990) and finally Maley (1994).

In 1979 when Danet made her review, the field was in its very early nascent state, such that one could not talk of a particular discipline in which the language of law was of central concern and certainly one could not talk of a socioilinguistics of law or courtroom discourse. So Danet (1979) could only say that 'in the last five years, a new field of social science research has emerged whose topic is the interrelation between language and law. Social

scientists, lawyers and linguists are attempting to hurdle disciplinary barriers in order to study how language relates to the function of law in society' (p.447). Relating the development of this research she points out that it had begun in the USA and Britain mainly but that a number of researchers in continental European countries such as Sweden, Germany and Austria have also become involved. She cites Probert (1972) as being concerned, in his call for research in the law concerned with language behaviour, as 'not concerned with the written language of statutes but with 'law talk.' She indicated that a number of legal scholars had been interested by the dependence of law on language but that their approach had been mainly philosophical while the new research aspired to be empirical. She pointed out that the interest in language and law was also in part a response to widespread public criticism in the 1970s of the uses and misuses of language in public life and particularly, in legal spheres by the 'Plain English' Movement.

The slow, tentative development in research on legal discourse as such is probably explainable in terms of the hardly developed disciplines of sociolinguistics and discourse analysis (in the seventies), which later became the natural place to study language in its context of use. Just a year later Danet, at the Communications Institute and the Department of Sociology, The Hebrew University of Jerusalem, Israel, published another, shorter review of the developing research in language and the law. This time she was more confident in her discussion of the field as there was really something concrete to report. The Law and Social Science Programme of the American

National Science Foundation had funded four teams of researchers; two of which had focused on courtroom questioning and the other two on the comprehensibility of jury instructions. This is the research which launched the now major researchers in various settings of legal discourse, notably O'Barr and Danet herself. This research was possible mainly because of developments in linguistics itself. 'Social scientists interested in the law (were) beginning to look at language and to ideas and methods of sociolinguistics and psycholinguistics, as a way of illuminating the legal process, how it works in practice' (Danet 1980 p.367).

Danet reported that:

Most of the sociolinguistically oriented work on the language of disputes has focussed on trials as conducted under the ground rules of the Anglo American adversary system of justice. This work examines such variables as 'powerful' versus 'powerless' speech of witnesses and its effects on judgements of their credibility (O'Barr and Conley 1976; Erickson, Lind, Johnson and O'Barr 1978), semantics and presupposition in questions (Loftus 1978; Loftus and Palmer 1974; Kaprzyk, Montano and Loftus 1975), and coerciveness of question form (Danet, Hoffman, Kirmish, Rafn and Stayman (1979). Atkinson and Drew's (1979) work, heavily influenced by ethnomethodology, follows a rather different course; it is an attempt to describe formal, structural and sequential properties of verbal interaction in courts, and to identify semantic features of sequences like those involving blame allocation during cross-examination.

Danet then summarised the five papers that were presented at the symposium on language and law in Bristol. These were, in their order, 'speech patterns and the outcome of trials,' 'linguistic and cultural interference in testimony,' 'lawyers' combativeness in the adversary system of justice,' 'syntactic variation in judges' use of language in the courtroom' and 'displaying neutrality- the management of an interactional problem in small claims court hearings.'

These then are the land-marking pieces of research in the study of language and the law if not courtroom discourse. The next review was done by Bhatia (1987) who organised his review around three settings in which legal genres occur viz. pedagogical, academic and professional settings. We note now that the clear term genre has come into currency, clearly indicating the development of a discipline based on languages of the professions, here the legal genre. The relevant setting for my purposes is the professional setting.

Work within the constructs of genre analysis and discourse analysis has concentrated largely upon particular aspects of the trial process notably the question-answer sequences of courtroom examinations centring on the social relationships in these interactions. Bhatia notes that counsel-witness examination (direct and cross-examinations) is the most popular discourse within the professional legal contexts. A recurring theme is that of control of the discourse by counsel to various extents including the strongest domination being that of the witness by counsel whose aim is to, in the words of Bhatia(1987), 'destroy the credibility of the witness.' This subjugation is the most strongly criticised by writers of the critical linguistics and critical discourse analysis school (Carlen 1976, Goodrich 1984, 1990, Fairclough1989, Lemke, Harris1980, 1990, Thompson1984, Wodak1985) and more moderately by genre analysts of the more applied linguistics approach (Dunstan 1985). This critical approach is also commented upon by Maley (1994) who notes that much of the comment on the language of the law has been critical and has been directed at its 'bizarre and inaccessible

forms' and that 'a related criticism is directed at the social consequences of the inequality of power it realises.' (p.14)

Danet (1990) gives an overview of 15 years of research in the language of the law in which she now considers that the field has expanded considerably. She noted that basic and applied research on linguistic aspects of communication in legal settings had also blossomed in Canada, Australia and Israel and in continental Europe. The literature of the Australian camp has largely concentrated on bilingualism in the courtroom including research on courtroom interpreting.

Maley's (1994) review centres on legal discourse as a genre and analyses it within the framework of the functional model developed by Halliday (1985). His recognises that the language of law is not a 'homogeneous discourse type but a set of related and overlapping discourse types,' and that, 'because such a range of different theoretical models has been applied to each, but never to the whole, each analysis speaks only for itself.' Both of these statements echo my own sentiments. But while he applies only one approach, the semiotic and functional approach, to the whole of legal discourse including legislative discourse, courtroom discourse and judicial discourse, my own approach is to apply various theoretical models to the discourses or genres of only one of these major discourses, that is, courtroom discourse.

The approach of the present study is one that seeks to characterise the trial as a site of interlocking discourses and to discuss and critique the various

themes that emerge from the analysis of real, natural language data. This approach is seen as one that is capable of bringing together themes that recur in studies that concentrate on only selected aspects of the trial process to show how, for example power asymmetries in one discourse type are balanced out by the sense of equality that is observable from another within the trial.

2.4 Criticism of legal language and courtroom discourse

Crystal (1997 p.390) observes that throughout the history of English law, there has always been some movement or other calling for change in legal language to eliminate archaic or Latinate expression, simplify grammatical structure and include punctuation in legislative writing to make legal language more intelligible to consumers, saving much time, anxiety and money and also simplifying the job of the lawyers themselves.

The Plain English movement in the seventies was complemented by similar developments in Europe. For example, Swedes call legalese ‘muddled Swedish.’ And linguists there have studied popular comprehension of public language and the language of judges. Critiques of legal language were also being voiced in Germany, France and Norway (Danet 1979 p.520).

Most criticism of legal language is that of written language such as the language of contracts, lease, conveyances, wills and other legislative writing,

but the 1980s saw the development of criticism of courtroom discourse in the work of people like O'Barr and Danet. In fact, according to Danet, the interest by social scientists in law and language is in part a response to public critique of the language of bureaucracy and the professions. She points out that critiques claim that the professions use language in ways that 'mystify the public and stultify critical thinking.' And that critics argue that the language of the professions is both a symbol and a tool of power, creating dependence and ignorance on the part of the public, (Danet 1979 p.525). This argument is echoed and developed in the 90s by CDA linguists who seek to emancipate the public. I subscribe to this position and point out to it in my thesis while not fully embracing critical linguistics and CDA in their particular approach to argumentation which I explain below in the discussion of approaches to the study of the language of the law.

The criticism of legal language, however, is matched by its defense. In fact according to O'Barr (1981), 'the ongoing dialogue between traditionalists and reformers continues today' around the world including Botswana. Traditionalists are more concerned with how other professionals will interpret the language of the law than with the layman comprehending it. They argue that the importance of consistency of interpretation in courts of particular words, terms and even entire legal forms far outweighs the advantages of popularising and simplifying legal usage. For example, an article entitled 'lets not oversimplify legal language,' by Aiken (1960) is cited as arguing that terms such as '*ipsa loquitur, caveat emptor, proximate cause, indenture, bequeath*, etc. are entirely appropriate and acceptable forms

of expression, properly used.' He also argues that they are the decided superior to ordinary words, which have no associated specialisation of meaning (O'Barr 1981 p.362).

As far as courtroom discourse is concerned, the most common perception and criticism concerns the inequalities of power, which underlie rules of speaking. The situation is hierarchical, extending from the judge and the magistrate at the top and most powerful, through counsel to the witness who is seen by critics as being powerless and even 'degraded.' (Maley in Gibbons 1994) 'Power is exercised by those who have the most right to speak. In examination, for instance, the witness, the plaintiff and the defendant are constrained to answer questions only and not volunteer their opinion. Counsel control topic management: they choose and pursue and change topics' (O'Barr 1981 p.34). In critical terminology, the defendants are variously described as 'baffled, bullied, oppressed, manipulated etc. (Atkinson and Drew 1979 p.8). Such criticism of courtroom discourse will be discussed in line with analysis of the data of the courtroom of this study with an attempt to see why the criticism holds .

2.5 Approaches to the study of language and the law

There are two major sociological approaches to the study of language and the law. The first is what Goodrich (1984) terms positivism and the second is his own approach, which is also the approach of most writers of the critical school of discourse analysis, historical materialism. The positivist approach

is described and criticised for viewing the law as ‘an internally defined system of notional meanings and legal values and that it is a technical language which is by and large unproblematically univocal in its application.’ (p.173). Goodrich argues that viewing language as ‘a neutral instrument of purposes peculiar to the internal development of legal regulation and discipline,’ is problematic.

The historical materialism approach on the other hand, views legal language in these terms, as:

‘The rhetoric of particular group or class and a specific exercise of power over meaning. In this view, legal language is seen as a social practice and its text as bearing the imprint of such practice and further that, as a discourse or genre, legal language is answerable to the political commitment of its time. Legal language is a unity to be understood as the social image of an elite with professional power. The hierarchical organisation of legal communication can be classified according to the schemata of lexical, syntactic and semantic choices regularly employed in legal language to control, appropriate or exclude other meanings and languages. Legal discourse is socially and institutionally authorised and sanctioned by a wide variety of highly visible organisational and sociolinguistic insignia of hierarchy, status, power and wealth...the identification of a privileged class.’ (Goodrich 1984 p.174, 182, 184, 188 passim)

This very lucid description of the social status of professional discourse is typical of the approach and is underscored by many theorists. Wickens (2001 p.31) cites scholars of the CDA approach as those who see their focus to be on ‘the relationship between language ideology and power,’ and see ‘the relationship as being fundamentally opaque and the role of text analysis in CDA is to ‘reveal’ the ideological loading embedded in discursive practices and the relations of power which lie behind them.’ Thompson (1984 p.23) in rather the same vein as Goodrich above sees historical materialism as taking

as its object 'the very process of class struggle...the movement of the working class.' One criticism of this affective stance of historical materialism, and CDA as its more recent vanguard, is made by Widdowson (1995, 2000 cited in Wickens 2001) who argues that in CDA 'interpretation in support of belief takes precedence over analysis in support of theory ...conviction counts far more than cogency.'

However, Thompson (1984) seems to rescue the situation by pointing to the negative connotations of the term 'ideology.' But then he comes back with similar affectivity when he introduces the idea of the relationship between language and ideology. He says that:

It is only in recent years that this theory (ideology) has been enriched and elaborated through the reflection on language. For increasingly it has been realised that 'ideas' do not just come floating like clouds in a summer sky...rather ideas circulate in the social world as utterances, as expressions, as words, which are spoken and inscribed. Hence to study ideology is in some part and in some way to study language in the social world. It is to study the ways in which the multifarious uses of language interact with power, nourishing it, sustaining it, enacting it.

The strengths and weaknesses of the historical materialist approach to discourse study will not be fully discussed here. They are fully outlined and discussed in Wickens (2001) who fully embraces CDA in his thesis. I must proceed to my own analytical approach as that of sociolinguistic pluralism, which recognises that there are many discourses and people involved in legal trials. Some or even many may be victims of an unjust social structure. So I argue that whether they are guilty as charged or not, the law, unless it is based or can be seen to be based on unjust socio-political practices, can

address itself to the circumstances of the defendant through the argumentation of the professionals involved and through judicial discretion, especially over sentencing. In the event with data like that which I have gathered, which relate to only one type of case, the traffic offences cases, one cannot speak of material disadvantage on the part of the defendants in the sense of material wealth as drivers of cars are considered privileged in the Botswana context.

This approach is one that seeks to typify the trial as a site of various interlocking discourses and critique and discuss the various themes that emerge from the analysis of real, natural language data. This approach is seen as one capable of bringing together themes that have come up in studies that concentrate on only selected aspects of the trial process and show how, for example, power asymmetries in one discourse type within the trial are balanced out by the sense of equality in another within the trial. For example in cross-examination the relationships between counsel and witness are ‘unfriendly’ if not actually hostile, but in direct examinations it is the reverse. This is interpreted to mean that even witnesses, who are laypersons in combat with professionals in cross-examinations, are aware that the cross-examination in an adversary system of justice cannot actually be friendly if its purpose is to be served well. Another example is that of submissions or closing statements by opposing counsel. Here one finds a barely concealed combat between professionals themselves. Clearly the outcome of the trial is not predicated on only one discourse type such as the cross-examination but on the cumulative effect of all the discourses in the trial.

2.6 Conclusion

In summary, we can see that the context of theory for this study is a field which has grown steadily over at least twenty years. Therefore there exists a body of theory in which to couch studies such as this one. However, as I have pointed out it is theory that needs to continue being developed and refined with more data from different linguistic as well as social contexts and with different methodologies.

SECTION B: METHODOLOGY

CHAPTER 3: Methods of data collection

The data for this study was collected initially by questionnaires designed in September 1998 and piloted in Botswana in December 1998 and January 1999. These questionnaires were designed to elicit the perceptions and opinions of courtroom practitioners on the uses of languages in the courtroom. One set of questionnaires was designed for the police officers who serve as both prosecutors and witnesses. The sample population for these questionnaires is small comprising 10 police officers. It has occurred to me that the population could have been enlarged by distributing the questionnaire to several police stations, but I distributed them only to one. There were only ten prosecutors at this station. I later discovered that at the magistrate's court of this study there were no more than ten regularly appearing prosecutors. So this makes the population of police prosecutors and witnesses adequately representative.

Another questionnaire was distributed to lawyers who appear in court as defense counsel. Again here the population is small (11 lawyers). The questionnaire asked basically the same questions of lawyers and the police, but allows in the particulars section, a differentiation of these for purposes of analysis and comparison of views of different sections of the court personnel. The questions were used to solicit the views, opinions and experiences of the respondents in relation to using language in the courtroom. The reason for using the questionnaires was to gauge the courtroom participants awareness of the ways languages are used in the courtroom; for example, in which

sections of the proceeding and to what extent are different languages used. This is against the background of the fact that the stipulated language of the magistrates' courts is English. This is of interest intellectually as we know that the use of natural language is very complex and stipulation is one thing while the actual pragmatics of language is another.

The rest of the data for this study is the actual language of courtroom proceedings as audio tape-recorded in four months of data collection as shall be described shortly. All the recorded data is used for analysis of communication processes in a court of law or, technically, discourse analysis.

Some member validation was attempted. Two interviews were made with lecturers in the law Department of the University of Botswana during the validation stage of this research process. One interview enabled me to get information on the legal system of Botswana and it was used in describing the context of this study. The second interview helped to validate the observations I made on the persuasion process in the courtroom. It is discussed in Section C, Chapter 6.2 on the closing speeches of opposing counsel and 6.4, analysis of judgements.

3.1 Fieldwork

Data collection for this study was made in three phases. The first phase was the early stage when I designed and administered questionnaires to police

prosecutors and police witnesses and lawyers. This was in December 1998 and January 1999. The second phase was done over the two months of August and September 1999 and involved daily visits to the magistrates' court to audio-record the proceedings. The third phase was done over January 2000 and involved further audio recording to collect supplementary data.

The quest for access to the courtroom whose proceedings were to be studied began with making an application to The Office of the President's Research and Publications Department in Botswana for a permit to conduct research in the country. This involved filling in a fairly detailed form requiring information on the aims of the research, objectives, methods and techniques, the budget of the research project and places in Botswana where the research would be undertaken. It turned out that the requirement of a permit to do research in Botswana was not a mere formality. It is described in the permit that the purpose of the requirement for a permit is both to check misrepresentation of the country as well as to encourage scholars to do research in the country. Five copies of the application form were made and I was informed it would take at least three weeks for the application to be processed as it needed a number of departments to look at it. This waiting period in July 1999, reduced the length of the recording period I had planned, but it turned out that, with tape-recording permitted, I needed less time than I had planned for data collection.

The next stage in the process of getting access was to write a letter to the High Court of Botswana to seek access to the particular courtroom I needed to study. I took this letter in person to the High Court and met and had a chance to discuss my research with the Master of the Court. The Master of the Court then wrote a letter to the Chief magistrate of the court in which this study was to be carried out to inform him that I had talked with him and requested permission to do research in his court. I took the letter to the Chief Magistrate of the court and had the chance to discuss my research project with him. He was very interested in the research and introduced me to two senior magistrates who would be presiding during the period of my data collection. He informed me that he had discussed my request with them and they had agreed to allow me to record their proceedings.

I visited the courtrooms several times whilst awaiting the research permit from the Office of The President, and made some observations, often very sorry that I could not yet record some of the (for my research) very interesting proceedings. During this waiting and observation period, I missed making recordings of two linguistically interesting closing speeches of opposing counsel of which I was only able to make some notes. I do use some of the written notes on these submissions in my data analysis of the submissions stage of the trial.

On the sixth of August 1999, I started recording the proceedings. I spent whole mornings in the courtroom and some afternoons when cases had been adjourned to the afternoon. I was allowed to sit at the front of the courtroom

with court clerk, a position which allowed the clear recording of the speech of the witnesses, prosecutors and counsel and magistrates. The recorder was not the most powerful one and thus some of the voices like those of defendants and witnesses and magistrates's readings of judgements (who were further from my table than prosecutors and counsel) were sometimes inaudible. But this is only a tiny proportion of the recordings and do not have any substantial effect on the data as a whole.

3.2 Research ethics and consideration of person anonymity

The conducting of qualitative research raises ethical issues in a way that perhaps quantitative, statistically based research can sometimes avoid. A good statement of the dilemmas the qualitative researcher can be faced with is perhaps that of Mason (1996 p.165) She makes the observation that in using qualitative data which is detailed and analysing it in contextual ways, 'the confidentiality and privacy of those who have some personal involvement with the research may be harder to maintain than where, for example, data are turned into statistical trends, patterns and correlations.' (Ibid p.165)

She points out that the detailed and visibly contextualised data that the qualitative researcher generates need to be handled with sensitivity on the part of the researcher but also that:

The qualitative researchers have to decide what to do with such data, in the knowledge that however friendly they may feel with the researched, and however they feel the relationship is one of mutual trust, they are nevertheless also a professional who is intending to use some of the products of the relationship for another, formal purpose. (Ibid p.165)

She argues that in trying to solve such dilemmas, qualitative researchers 'have had to think in complex and sophisticated ways about confidentiality and privacy ... precisely because they do not have the comfort of anonymous, statistical analyses based on depersonalised numerical data to 'hide' behind' (ibid.p.165). Having said this however, I have to point out that in this research, although the number of members of the researched community involved is small, the nature of the data, being linguistic texts, and the ways they are analysed, by the methods of a specific discipline (Discourse Analysis) should not be overly sensitive to person. In the legal context involved, one of the ways of maintaining person anonymity is to expunge names of people from the labels of the cases of the state against the defendants as I am well aware of the law that prohibits the naming of people in legal cases except for purposes of legal precedence itself. The rest of the researched community involved is covered from injury or any possible degradation by the fact that, as professionals themselves, they are aware of the formal purposes of academic research. I shall therefore proceed to use that data in a way that I believe, apart from their possible ignorance of the methods the disciplines of sociolinguistics and discourse analysis, they will recognise as legitimate.

3.3 Description of the data

This section presents the data of the whole study including the questionnaire studies and the tape-recorded courtroom proceedings.

3.3.1 The questionnaire study.

As has been pointed out in the discussion of the research design above, the research population is, as is typical of professional communities in Botswana, small. The study of police prosecutors and witnesses involved ten members, and the lawyers study involved 11 members.

Ten questionnaires were returned by the police and the following records the characteristics of the sample:

Key to the table

J.C. = Junior Certificate (a Botswana educational certificate)

GCSE = General Certificate of Secondary Education. LLB = Bachelor of Laws

Cert. and Dip. Law = Certificate and Diploma in Law LLM M = Master of Laws

Age	Years of experience	Education Botswana Educational Certificates	Gender	First language
20-29	1-5 (1)	J.C. (7)	F (2)	Setswana (7)
30-39 (7)	6-9 (0)	COSC (0)	M (8)	Kalanga (3)
40-49 (2)	11-15 (7)	LLB (1)		
50-59 (0)	20-25 (2)	Cert.&Dip. Law (2)		

Table 1 Characteristics of the questionnaire study sample Prosecutors and Police witnesses

8 prosecutors and 4 Witnesses (2 of the police persons were prosecutors as well as witnesses

11 Questionnaires were returned by lawyers and the sample had the following characteristics:

Age	Years of experience	Qualification	Gender	1 st Language
20-29 (4)	1-5 (5)	LL.B. (9) LL.M. (2)	F (2)	Setswana (7)
30-39 (7)	6-9 (3)		M (9)	Kalanga (3)
40-49 (0)	10-15 (2)			Tonga (1)
50-59 (0)	16-19 (1)			

Table 2 Characteristics of the questionnaire study sample: Lawyers

All lawyers had English and Setswana as their other languages.

Each set of respondents was asked six questions relating to the awareness of the uses of different languages in the courtrooms they have worked in. These appear in Appendix 1 and will be analysed in Section D relating to the bilingual nature of the courtroom.

3.3.2 Audio recording

The bulk of the data of this study came from audio recording of the courtrooms proceedings. All but two cases recorded (at various stages of the

trial) were traffic offences involving drunken driving, driving without due care and attention and driving without valid drivers' licences. Most of the defendants were men of various ages. Only one case involving a woman defendant charged with drunken driving was recorded. However this characteristic of the trials, their being traffic offences, may reflect the fact that not all cases of the particular magistrates' court were recorded during the data collection period as I attended only three days a week and could only record in one courtroom whilst other proceedings were going on in the other courtrooms at the same time.

In all, forty hours of proceedings were recorded on forty one-hour-play tapes. Of the texts from these proceedings, there are fifteen mentions (the preparatory stages of trials) mostly made by police prosecutors but including a particularly elaborate mentioning by a lawyer prosecutor. There are four charge sheets, eight direct examinations, six cross-examinations, five submissions, five readings of facts and three judgements (most of the judgements were inaudible on tape). I shall tabulate these figures for a more holistic view of the data

Table 3 The data

Data	Quantity
Mentions	15
Charge Sheets	4
Direct Examinations	8
Cross Examinations	6
Submissions	5

Readings of Facts	5
Judgements	3

Table 3 The data

Some peculiarities of the data of this study are the absence of certain trial processes that would be found in most courts. There are only two opening speeches and they are of opposing counsel in one trial. This means there is only one such speech from a prosecutor and one from defence counsel. This data is therefore not analysed as there is not enough of it to allow generic analysis. In the examinations data there is one prosecution cross-examinations and no defence direct examinations. I was told that this is so because most of the cases involving traffic offences are undefended so there are usually no defense witnesses. In the forty hours of proceedings, there were only seven cases defended by defense counsel. For these reasons there is a lot of prosecutor talk, mostly as we shall see in the data analysis, in mentions and readings of facts and in direct examinations. There is relatively little lawyer talk but we do have three defense counsel submissions and four cross-examinations by defense counsel. There are three prosecutor submissions and one prosecutor cross-examination.

This data is considered adequate for an in-depth, qualitative analysis of the discourse in this courtroom context. There are more than three instances of each sub-genre of the trial and this allows for comparison of the texts for characteristics of the particular process and therefore I consider there is enough data on which to base analysis of generic structure. Opposing counsel

opening speeches will not be described as they are not characteristic of proceedings at this level of court, being more characteristic of appellate courts. But all other stages of the trial observed in this courtroom are probably typical of the trial in any magistrate's court.

3.3.3 Transcription of the data

The transcription of the data from the audiotapes of the court proceedings in the magistrate's court has not been based on any prior theoretical model of transcription and most noticeably not on conversational analysis conventions, such as, for example, the convention of including timings of utterances like lengths of pauses. The transcription has also not concentrated on the phonological aspects of language such as stress, intonation or pitch. Speech phenomena like pauses, hesitation, backtracking and false starts are also not prominent in the recordings because the speeches of participants like prosecutors and counsel are largely rehearsed or partly rehearsed and some, like examinations by prosecutors, are also routine. The reason for excluding phonological information from the data is the (fact of the numerical) size of the data and the fact that the data is considered holistically and not phonetically involving detailed analysis of single, short stretches of talk. Instead, the data is used to exemplify generic structures and discourse at the theoretical levels of acts, moves, exchanges and transactions. The transcription highlights pairs of speakers such as magistrates and defendants,

prosecutors and witnesses, counsel and witnesses, and interpreters, but makes use of no other transcription symbols. The transcriptions are included in Appendices 1 to 7. As I was present in all the proceedings recorded, and transcribed the tapes myself, and able to replay the tapes during analysis, I was able to take the necessary phonological and extra linguistic information into account in the analyses.

The total pace of the proceedings is very slow because other speakers in the court have to wait for the magistrate to make his record and, during mentions, he has to do the administrative work of deciding on dates for trials, further mentions or other stages of the trial such as dates for judgements. In other stages of the trial as in examinations for example, the magistrate controls the pace of the proceedings by the amount of time it takes him to make his record of the words of prosecutors, counsel and defendants and witnesses. For example, during a direct examination session the prosecutor does not ask the witness the next question until the magistrate gives the signal that he can continue by raising his head from writing and saying, 'Yes' with a falling tone.

In this thesis four models of textual analysis have been employed relating to various discourses. These are genre analysis (particularly Martin (1993), which is applied to the texts of the mentions stage of the trial. Narrative analysis is applied to the submissions and judgements and as a metaphorical context for the whole trial, i.e. the trial seen as the building up of stories, in particular the story formulation of Bennet and Fieldman (1981) reformulated

by Jackson (1988). The IRF model (Sinclair and Coulthard 1975) and subsequent reformulations (1981) of discourse analysis is applied to the examinations. Analysis of bilingual discourse is applied to the stages of the discourse that involve the use of two languages, namely, examinations, readings of facts and readings of charge sheets.

These models are more fully discussed in the sections in which they apply in the theses.

3.4 The research questions

This research is guided by and seeks to answer three questions relating to the use of language in the courtroom in Botswana. The first question is, ‘What social issues underpin the uses of language or languages in the courtroom?’ The second question is, ‘How does the court address the existence of other languages in the courtroom?’ and the third is ‘How does English facilitate communication in the courtroom?’ Answers to these questions will be made throughout the data based sections of this thesis and will be abstracted in a summary in the concluding chapter of the thesis.

SECTION C: THE COURTROOM PROCESSES

Chapter 4 Communication processes in the courtroom

4.1 Introduction

The main or major courtroom process can be said to be the trial itself. O'Barr (1982) describes the trial as:

A situation in which many people, often as many as ten or more, present various versions of what happened. Their versions overlap to some degree and together tell a story. As the trial unfolds and opposing sides present evidence, it becomes clear that all versions cannot be equally correct. It is the role of the jury (or the judge in a bench trial) to decide which witnesses to believe and whose testimony to uphold above others in reconciling the differences.

By reason of involving so many people on the two sides of the argument, and involving some obviously very lengthy processes such as the question and answer sequences of the examinations, the trial, if not differentiated into several very different processes with different purposes, may seem very tedious to the observer. It is when one gets inside it to characterise the processes involved in the trial that one gets a clear view of its nature. In this study, as indeed other studies of courtroom communication such as Danet (1979), Harris (1980) Maley (1994) the trial is viewed as a process involving several discourses between different interlocutors, each with its own particular purpose and structure. Harris (1980), applying a quite different model of analysis from, for example that of Maley (1994) terms these processes 'Transactions' (after Sinclair and Coulthard 1975) and distinguishes between four main Transactions in the courtroom of her study as the Preliminary Transaction, the Information gathering Transaction, the Ordering Transaction and the Closing transaction (ibid p. 63). Danet (1979), again viewing the trial process from a different

analytical perspective – as genres- states that ‘there may be several genres in a trial: opening statements, testimony, closing statements, and the judge’s charge to the jury’ (ibid p. 493). These different labels for courtroom processes may arise from the different analytical perspectives employed in their analysis as well as the existence of these processes in different types of courts. For example Harris (1980)’s transactions are those observed in the Arrears and Maintenance Courts in Britain in which the defendant and the magistrate communicate directly with each other without the intervention of lawyers. This may be the reason why there are only four transactions as against my seven, which include administrative transactions as shall be shown presently. Danet (1979)’s genres on the other hand are descriptive of criminal trials involving legal counsel, judges and the jury, hence the opening and closing speeches and judge’s charge to the jury, where the Botswana magistrate’s courtroom has no charge to the jury.

My perspective is one that brings together discourse analysis, genre analysis and narrative analysis to the enterprise of describing the various processes or discourses of the trial. Whether they are labelled transactions or sub-genres, there are seven processes involved in the magistrate’s court of this study. I refer to them in the labels they are given by the discourse community itself. Thus instead of opening or closing statements, this stage of the trial is termed submissions as they are called in this courtroom. And instead of the fact gathering transaction as in Harris (1980), or testimony as in Danet (1979), there are two transactions called the examinations transactions. The rest of the other transactions of the trial in this court are specific to the particular court as it is differently organised from, say, British or USA courts. In

the British criminal courts as observed in Coventry in 1999, for example, there are two separate courts conducting different stages of trials. The County Court deals with the preparatory stages of the trial. Here cases are first mentioned. The magistrates then decide things like dates for trials, granting or refusing bail for defendants and referring cases to the Crown Court for trial. The Crown Court then conducts the trials. In Coventry these courts are in the vicinity of each other so that it is possible to walk from one court to the other. The Botswana magistrate’s court on the other hand does not recognise a similar division of labour as the two British courts just described. Here the same court sits to hear mentions of cases, decide dates for further mentions or other stages of trials like examinations, final submissions, readings of facts or judgements and, often, a variety of these are transacted within the same sitting or working day.

4.2 The order of courtroom transactions

The following table sets out the communication processes in the Botswana magistrate’s court in their order of appearance in the trial.

Transaction	Participants	Activity	Sample text	Communicative purpose
Mentions	Prosecutor and Magistrate	Prosecutor introduces himself, announces the stage	I appear for the state, Your Worship. This	To initiate court proceedings and do other administrative

		at which the trial is and makes a request.	is a mention. May the date of trial be set?	work like set dates for trials.
Readings of Charge Sheets	Court Clerk and defendants	The court clerk reads the charge sheet to the court and the defendants and asks the defendants to make their pleas.	You are L.M. You stay at house number 1888 Machoba 12. Gweru Zimbabwe etc. You are charged with the offence of... etc.	To inform the court and the defendants and get the defendants' responses.
Direct Examinations	Prosecutors and witnesses	Swearing in of witnesses The prosecutors ask questions and the witnesses answer	I swear that the evidence I shall give is the truth etc. Pros: Do you know the accused person? Yes Will you please tell this honourable court how you came to know the accused person?	To establish the facts of the case and build up the story in favour of the prosecution
Cross Examinations	Defense counsel and witnesses	Counsel ask questions and witnesses answer	Now, you have described to this court eloquently how the accident happened. Will I be right if I say that when the car moved out of the road you couldn't see clearly as to what the cause was?	To find weaknesses or inconsistencies in the evidence adduced by the direct examinations and to discredit the prosecution witnesses to re-establish the facts in favour of the defense
Submissions	Prosecutors and	Monologue	Your Worship,	To persuade the

	defense counsel	arguments summarising the case and highlighting supportive evidence, precedents and points of law	with respect, this honourable court has not been favoured with an explanation of this discrepancy	magistrate to judge against the opposing side
Readings of Facts	Prosecutor	<p>Monologue</p> <p>The prosecutor reads the facts of the case to the court much as recapitulation of what was in the charge sheet but this time in the third person narrative form</p>	The accused is as named in the charge sheet. He is charged with two counts of...etc. On the 23 rd day of May 1998, the police received information from a reliable source that the accused was in possession of a pistol-like object etc.	To recapitulate what was on the charge sheet before the judgement
Judgement	Magistrate	<p>Monologue</p> <p>Argument summarising the case highlighting important evidence from either side, quoting precedent and making a ruling</p>	The accused person is said to have on the 2 nd of April etc. He however was not sure whether the machine was in good working order etc. Therefore the accused is acquitted and discharged	For the magistrate to persuade the court that his ruling on the case is the only one possible given the evidence and to make the judgement.

Table 4

(Texts exemplifying each Transaction come from the data of this study.)

I want to suggest that courtroom processes fall into two types, substantive processes, which encompass the fact gathering of examinations, the arguments of submissions

and the judgements; and administrative processes being (in this courtroom) those of mentions, reading of charge sheets and facts. These processes were presented in table 4 in the order in which they appear in the trial, which is basically a logical order of progression through the case. However an important issue in ordering of the processes involves the gross and internal order of the substantive transactions, that is the order of presentation of evidence in the examinations in terms of who speaks first, and order of presentation of argument in terms of what points are made first in the submissions. These orders in the adversary trial have been the subject of study of at least one team of researchers - Walker, Thibaut and Andreoli. They state that

The order of presentation of evidence in an adversary proceeding has an important effect upon the final determination of guilt or innocence... Gross order is determined by statute for the three parts of the traditional adversary processes: opening statements, presentation of evidence and closing arguments. The prosecution or plaintiff usually has the right to make the first opening statement. Present the evidence first and make both the first and the last final closing arguments. (1973-73 p. 216)

They claim that the justification usually given for this order is that the party with the burden of proof should have the advantage of the first and the last presentation. To study the effect of gross order on jurors, Walker et al designed and carried out an experiment using a hypothetical case which could arise in either a civil or criminal court. The case comprised fifty brief factual statements divided equally into 'lawful' and 'unlawful' bits of evidence. Their subjects were instructed to listen to the evidence and then decide whether the defendant's acts were lawful or unlawful. In the presentation of the facts, either the unlawful facts were presented first then the lawful facts or vice versa. The effects of gross order were then measured by the judgements of the subjects to whether the defendant's action was lawful or unlawful and their

certainty about those judgements. Each side presented the twenty-five bits of evidence five at a time and after each the subjects were asked to indicate their the extent to which they *currently* considered the defendant's actions to be lawful or unlawful by checking a nine-point scale (one being unlawful and nine being lawful). After the last set of facts, the defendants were asked to indicate their final opinion on the case and their degree of certainty. (p.218)

Walker et al reported that gross order does make a difference and the second presenter is in a more favourable position. They state that in three of the four cases, the party going second obtained more favourable results. These researchers used this experiment to prove that the gross order of presentation in an adversary trial is suitable for the process. They go on to account for the gross order results (p.223) but the significant point here is that they find the order of presentation of evidence in an adversary trial supportable. They state that 'the traditional adversary trial thus appears remarkably well arranged to neutralise the effects of order and thus maintain the fact-finding process relatively free of this relatively powerful yet legally irrelevant influence.' (ibid p. 226) The significance of internal order i.e. order of points within an argument is discussed in this thesis in the chapter dealing with submissions.

The order of transactions in the magistrate's court observed is also aptly described by the University of Botswana law lecturer I interviewed. He explained that:

... But the structure is as follows: Normally you make an opening statement You just give the court in broad strokes give them a picture of what you are going to tell them or what the evidence you are going to win from the witnesses is all about. You don't tell the court the evidence itself, you just give

them a broad picture of something you are going to tell them like a good introduction into the true story itself and after the opening statement you call the witnesses themselves who are going to give the meat or substance of the opening statement that you gave to the court. The witnesses, first of all you examine them, what is called examination-in-chief. So in the examination-in-chief you ask the witnesses a series of questions geared towards developing a particular point of view. You have to be very consistent. You must form a very good chain of events and a coherent picture. Immediately after you finish with the witnesses then there will come up your adversary in the case, the lawyer from the other side and now cross-examining your witnesses trying to also trying to discredit the coherence of your story so that at the end of the day his story may be the one that is accepted by the court. So after the cross-examination is now complete that is after the leading of the evidence-in-chief and the other side has cross-examined, cross-examination means testing the truthfulness of the evidence that was given in the examination-in-chief, then comes what is called re-examination. The first party who himself was examining-in-chief now has to rehabilitate the witness that is if there was harm done by the cross-examination. After all the examination has been led now comes the interesting part. That is where you have the closing arguments. Most people call it closing argument but normally it is called summing up. Now why do you sum up? You sum up because there has been evidence in chief that was led by the party who starts, there has been cross-examination, questions have been asked which tried to impeach the examination-in-chief, now there is the whole evidence, a mixture of facts and everything, and exhibits, pictures, diagrams and photographs, now the closing statements now that is when you get the real meat of the art of advocacy. Now after having all these raw materials, in the form of evidence now the lawyer comes in there to convince the court that his version of the events is the correct one...

This explanation of the order of the substantive courtroom processes captures the essence of the processes, what happens in each process that is the examination-in-chief, the cross-examination, re-examination and counsel's submissions as they are taught to law students. (note that the re-examination process does not feature in the data of this courtroom and thus it is not listed in this courtroom's processes.)

4.3 Monologues and dialogues.

The communication processes in this courtroom, including substantive and administrative processes; divide into two theoretically important types of discourses namely, the monologue types including readings of facts, submissions and judgements, and the dialogues including the mentions, the readings of charge sheets and the two types of examinations.

The theoretical significance of dividing the processes in this way, as monologues and dialogues has to do with the types of issues and characteristics of courtroom discourse that can be seen to attach to each type of discourse and the methodologies that are applied to each type of discourse. The main issue attaching to monologues is that of persuasion in the courtroom and the role of narrative analysis in bringing out the strategies of persuasion through narrative coherence. Apart from the mentions, which are administrative, the substantive monologues, those central to the trial as a genre are the submissions and judgements. The dialogues, on the other hand when handled by the Sinclair and Coulthard (1975) model of analysis of formal discourse, reveal the interpersonal issues of power distribution among courtroom participants. The administrative dialogue is that of the reading of charge sheets, by the court clerk, to the defendant and the substantive dialogues are those of the examinations.

Analysis of the administrative processes and the substantive processes, as well as analysis of the bilingual character of the courtroom, form the substantive (in terms of data analysis) part of this thesis. Thus we have chapters 5, Administrative Processes; Chapter 6 and 7 Substantive processes; Chapter 8 Bilingualism in the Courtroom and Chapter 9 Courtroom Interpreting.

I think it is important to get a clear picture of which participants in the courtroom are involved in which types of discourse. Therefore this table should make this clear.

DISCOURSE TYPE	PARTICIPANTS
Monologues: Submissions Readings of Facts Judgements	 Defense counsel and prosecutors to the court Prosecutor to court Magistrates to the court
Dialogues: Mentions Readings of Charge Sheets Direct Examinations Cross-Examinations	 The prosecutor and the magistrate Court Clerk to Defendants Prosecutors and Witnesses Defense counsel and Prosecution Witnesses

Table 5 Botswana courtroom discourse types

As has been explained in the description of the data in the methodology section of this thesis, a peculiarity of the data of this study is the absence of direct examinations by the defense and cross-examinations by prosecutors. This was because most cases were undefended and where defended, defense counsel never called witnesses. This was due, I believe, to the fact of the cases being traffic offences which would not have

defense witnesses, who in these cases would be eye witnesses to the events of the traffic offence charges.

The distinction between administrative and substantive processes is also theoretically based. Administrative processes attach fundamentally to the facilitative role of routine in the everyday work situation of any organisation. This element of organisational discourse is more fully discussed in this thesis in Chapter 7.2. Table 6 reveals which court personnel also perform administrative roles. For example the prosecutor, being also a police officer, performs various administrative tasks such as commanding the people in court to stand up when the magistrate enters the court and when he leaves by the routine words, ‘All rise in court!’ He or she also mentions cases and reads facts of the case before the judgement is read. The other people involved in administrative functions in the court are the magistrates during mentions and throughout the proceedings taking notes for the record. The court clerk reads charge sheets and calls each new case by stating ‘The matter between the state and X.’ Table 6 helps in the identification of the administrative and substantive processes.

Administrative communication processes	Substantive communication processes
Mentions (prosecutors & magistrates)	Examinations (prosecutors, counsel and witnesses)
Readings of Charge Sheets (court clerk and witnesses)	Submissions (prosecutors and counsel)
Readings of Facts (Prosecutors to court)	Judgements (magistrates)

Table 6 Administrative and Substantive courtroom processes

CHAPTER 5: ADMINISTRATIVE PROCESSES

5.1 Introduction

I have, in the chapter introducing the courtroom processes, made the theoretical distinction between administrative processes, including monologues and dialogues, and substantive processes, those central to the trial as a macro-genre also including monologues and dialogues. Following the table identifying administrative and substantive processes we will in this chapter, the second data based chapter of this thesis, proceed to describe and discuss the administrative processes and these are the processes of Mentions, Readings of Charge Sheets and the Readings of Facts.

The data of Mentions, Charge Sheets and Readings of Facts are subjected to analysis by the analytical models of genre analysis developed and applied to texts by Martin (1993) and the narrative analysis model described by Kress (1993). The rationale for selecting these models will become clear in the following discussion of available genre analysis models.

5.2 Some genre analysis models

Genre analysis is a recent development in discourse analysis (Bhatia 1993 p.16). There are several models of genre analysis, which developed at around the same time, the 1990s. I distinguish these models largely by their

definition of the term genre, which tends to influence the practical steps taken in analysing genre. The first of these first of these approaches is that of Swales. Meriel Bloor (1998 p.53) attributes the theory of genre to Swales about whom she writes that, 'the conceptual structure of a subject is formulated (or constructed) in language,' and that 'it was to better understand the process by which this takes place that Swales developed the theory of genre analysis for which he has become well known.' Swales (1990 p.33) first gives the dictionary meaning of genre that 'a genre is a distinctive category of literary composition' but goes on to state that 'today genre is quite easily used to refer to any distinctive category of discourse of any type, spoken or written, with or without literary aspirations.' I find that a definition like this is not very helpful to any researcher or writer wishing to analyse a specific genre, as it does not say just what distinguishes genre. However a definition that comes close to this is also attributed to Swales (1981b, 1985 and 1990) by Bhatia (1993 p.13) Swales is quoted by Bhatia as defining genre in these words:

It is a recognizable communicative event characterised by a set of communicative purpose(s) identified and mutually understood by the members of the professional or academic community in which it regularly occurs. Most often it is highly structured and conventionalised with constraints on allowable contributions in terms of their intent, positioning, form and functional value. These constraints, however, are often exploited by the expert members of the discourse community to achieve private intentions within the framework of the socially recognizable purposes.

Swales' definition approaches genre from the point of view of the discourse community and its use and understanding of its genre. We might add that genres are recognisable even to non-users. Given the tone and structuring of

elements in a text, anyone familiar with the domain of use of advertisements and sermons can readily assign such texts to these domains of use. However, the main contribution of Swales' definition is the notion of 'communicative purpose,' which has been picked up by later scholars such as Martin (1993) and Kress (1993) and operationalised to aid in analysing genres.

Two significantly different models of genre analysis, that by Gunther Kress and J. R. Martin, are set out in The Powers of Literacy: A Genre Approach to Teaching Writing, edited by Cope and Kalantzis (1993), with each model applied to the analysis of a different text. While Martin (1993) proceeds to apply his model to a text without reference to any other model of genre analysis, Kress sets out in his chapter to contrast his model to Martin's. Martin defines genre as a 'staged, goal oriented process' (p.116) and proceeds to analyse the text, 'Innovative Fisheries Management: International Whaling,' written by the scientist, W.R. Martin (1989); describing the stages of its development and accounting for them (see pp 116-136). The simple definition of genre is shown to be very effective in analysing this ideationally complex, but textually simple text written by a scientist. This is the model I have elected to use in the description of Mentions, Readings of Charge Sheets and Readings of Facts one class of the courtroom genres. The reason will become apparent after I have discussed Kress's model and shown why it is not appropriate for the analysis of the administrative processes in the courtroom.

Kress's is the more user-friendly discussion. He defines the first two things a student of discourse analysis would want to know about genre analysis, (1) what is a text? (The subject of analysis) and (2) what is a genre? (The model of analysis) He introduces his 'social theory of language' by pointing out that the text is the most important unit of analysis in a social theory of language and defines it as 'the socially and contextually complete unit of language.' (p.24). He exemplifies his definition with a greeting exchange between friends and states that as a text, 'its origin is entirely social, as its function.'

As far as defining the term genre is concerned, Kress (1993) states that 'even the so-called genre school does not have a unified approach to the term' (p.32). He distinguishes between two approaches as his own approach and Martin (1993)'s approach. He states that:

The best known and widely used approach, that of J. R. Martin and Joan Rothery, treats genre as a term which describes the whole complex of factors which needs to be described and understood about a text. In this approach, the term genre covers everything there is to know linguistically about a text, which in turn, can be accounted for by ideological context.

He contrasts this approach to genre analysis with his own in which, 'which is to some extent reflected in work by others in Australia and which has some influence outside Australia,' in which 'genre is a term used to cover one aspect only of textual structuring' (p.32). This approach focuses 'not on the task being performed by or with the text, but rather on the structural features of the specific social occasion in which the text has been produced' which have been seen as 'giving rise to particular configuration of linguistic factors

in the text which are realisations of, or reflect, these social relations and structures' (p.33). Kress points out that in describing or analysing a text, he is not interested in the stages, but rather, for instance, in discovering and describing who has the power to initiate turns and complete them, and how relations of power are realised linguistically (p.33).

The eminent aim and purpose of seeing genre in the light of social structural relations and the wider context of culture is pedagogic in origin and as Kress put it, 'work on genre in relation to literacy developed out of quite specific educational and political aims, namely to bring about greater possibilities of access to the resources and the technology of literacy and through greater access, to bring about some of the conditions for redistribution of power in society' (p.28). Although it is possible to envision an educational curriculum that equips the layman to the law with the skill of dealing with the law when they come against it, Kress's wider social structural definition of genre is one that is not very productive for the analysis of data relating the administrative processes in this study for the main reason that the administrative genres in this courtroom involve professionals, being prosecutors; defense counsel and magistrates, talking to each other and therefore the social relations reflected in these processes are less those of inequality of power than those to be found in the examinations. So for the purposes of analysing these genres the simpler 'purposes' model of Martin (1993) is more suitable. This is the model of analysis that 'focuses most on the purposes of the participants who produced the text; on the task they wished the text to perform, which reflect

the stages of the social task which the participants are performing' (Kress 1993 p.32).

This model, which I call 'purposes and stages model' and another model, that of narrative structure, are particularly powerful for describing all the administrative processes, both the dialogues of Mentions and Readings of charge Sheets and the monologues of the Readings of Facts. The following quotation neatly explains why they are so productive:

Two types of textual form have been particularly influential in shaping this approach. Both have strongly marked sequential stages. One is the model of the 'service-encounter following the work of Eija Ventola (Ventola 1987). This describes the shopping encounter, from the first exchange between buyer and seller to the concluding exchange... such encounters have great regularity and predictability about the unfolding of successive stages in the encounter, so much so that one can readily produce the algorithms and flowcharts to map out the sequential unfolding. The other model is that of narrative structure. Here the text is not a record of direct interaction between the participants in the production of the text; rather, a strongly marked, strongly conventionalised sequence which itself reflects or realises a more abstract cultural algorithm of initial equilibrium – disturbance of equilibrium – conflict or tension – resolution of conflict – re-establishment of new equilibrium... The text performs a more abstract cultural task, in this case assimilation and incorporation of some problematic event or factor into the larger classificatory structures of the culture. (Kress 1993 p.32)

The Mentions, Charge Sheets and Readings of Facts texts making up the data of this study are perfectly suited to analysis by this genre analysis model in which genre is defined as 'a staged, goal-oriented social process' for the reason the stages and purposes of texts are highly recognisable in these texts, making them amenable to analysis by a model which recognises these aspects of texts, that is, the fact that their structures reflect the social

purposes for which they are created and the successive unfolding of the stages that perform these purposes. The Readings of Facts texts on the other hand reflect stages in the second sense described in the preceding quotation, that is the sequencing of narrative events in the texts. I shall therefore proceed to describe the Mentions and Charge Sheets as dialogues and the Readings of Facts as monologic narratives.

5.3 Mentions

5.3.1 Definition

The term Mention in the court derives from the canonical meaning of the term. The dictionary meaning is ‘to refer to by name.’ This stage of the proceedings is where a case in the court’s day’s business is named by the Court Clerk to initiate the proceedings of the particular case. The words uttered by the Court Clerk to name the case are: ‘The state versus X,’ by which words the defendant is summoned to the dock. Mentions in the Gaborone Magistrate’s court are the preparatory stages of trials. They are allowed as the first stage of any case or ‘matter’ before the court and can be returned to at any stage of the trial. They enable movement back and forth in the trial and give everyone – prosecutor, counsel and litigant a chance to

prepare for the particular stage of the trial. For example a case at the trial stage can be suspended by applying for a date of mention to allow further investigation by the police and a case can be mentioned several times before it is tried. Any day in the life of the courtroom can have the bulk of the proceedings being mentions and one or two other stages like examinations, readings of facts, charge sheets and pleadings, and judgements.

Mentions are addressed to the magistrate by the Prosecutor and their main function is administrative, to inform the court about the case and supply other details pertaining to the case so that decisions can be made by the court regarding the cases, whether the case will be set for trial or any other stage of the trial. The Mention's and Reading of Charge Sheet's statuses as administrative processes become very clear when they are followed by the first substantive process of the trial, which is Examinations. It becomes clear that the Mentions and Reading of Charge Sheets are preparatory to the substance of the trial which is the information gathering of the examinations, the arguments of the submissions and judgements, and the magistrates' rulings.

They constitute a dialogue between prosecutors and the magistrate in the presence of the defendant. For example:

Excerpt 1. Case number 8 06-08-99

Pros: Your Worship, I appear for the state in this matter. It is a mention. May another date of mention be set? The accused is remanded in custody

Mag: How old is he?

Pros: He is nineteen, your worship.

Mag: Why did you detain him?

Pros: Er well eh, your worship the evidence ... In any case I do not have any objection to releasing him, the only reason which we remanded the accused

is that by that time rape was (inaudible) We know where he stays. He can be granted bail.

Mag: (to the accused): All right. I will take you in my confidence and grant you bail for P1000. Report to this court on the seventeenth of September.

5.3.2 Description of the data

The database of this analysis is seventeen mentions numbered Cases one to seventeen. The data is transcribed from two tapes dated the 6th of August 1999. All the seventeen cases began with prosecutors and counsel introducing themselves to the magistrate and ended in magistrates setting the dates of further mentions or dates of trials. The legal officers mentioning cases are police prosecutors. It appeared that about ten police prosecutors were regulars, i.e. the same people bringing cases for mentions, in the duration of the data- recording period.

5.3.3 Data Analysis

The Mentions stage, being the stage that initiates the court proceedings, for each case, and being administrative processes always involved the Prosecutor introducing himself in the first move. So trial opens with self-introductions of the court personnel to the magistrate. These self-introductions involve utterances of a particular grammatical kind and variations thereof. The table gives information on variations of the self-introduction stage.

Table 7 Realisation of the self-introduction stage

Utterance	Participant	Frequency	Style
I appear for the state Your Worship.	Prosecutor	12	Unmarked/regular
If it pleases Your Worship, I appear for the accused.	Counsel	2	Flamboyant
May I appear for the state, Your worship?	Prosecutor	1	Flamboyant
Your Worship, I represent the state.	Prosecutor	1	Variation
Your Worship, I am Inspector M. appearing for the state	Prosecutor	1	Flamboyant

As shown in Table 7, the prosecutors' preferred linguistic manner of self-introduction is a simple 'I appear for the state.' The grammatical realisation of the self-introduction is generally a simple Declarative with the structure – Subject-Predicate-Adjunct (SPA), 'I appear for the state, Your Worship. But more flamboyant expressions are employed, especially by counsel, for example, 'If it pleases Your Worship, I appear on behalf of the accused,' the prosecutor in this case, case number 13, seems to take the cue for style from defense counsel and declares, 'Your worship, may I appear for the state?' The use of the conditional phrase 'If it pleases the court...' and the modal verb phrase 'may I...' are terms of deference and polite request respectively and serve to hold the magistrate and the court in high esteem. This tendency for the court to be reified is pervasive and prevalent throughout the court proceedings and sometimes even litigants engage in this aspect of the language of the court. I have met someone who had never heard a court in session before and was shocked to hear the magistrate being addressed as '

Your Worship.’ I tried to explain that the practice was not sacrilegious because as the law derives from the commandments of God, the person of the magistrate may be seen to be the vicar of God, even in a secular institution.

However a more powerful apologetics for the practice is to be found in the literature. Walker (1987) explains the socio-cultural basis of this power. She states that ‘as institutions for dispute resolution evolve, certain members of society are sanctioned by the group as authorised participants whose roles, if not persons, command respect...thus a societal institution, cultural norms for role assignment and deference toward those roles and a body of laws (p. 58-59)

5.3.3.1 The purposes and stages of the Mentions genre

Mentions may be regarded as a courtroom genre as they have a clear generic structure that can be described in terms of purposes and stages. The stages include the opening, the development and the closing of the mention of a case.

The opening begins with self-introductions of prosecution and counsel to the magistrate – ‘Your Worship, I appear for the state’ and ‘if it pleases your worship, I appear on behalf of the accused.’ The next stage is then an announcement by the prosecutor of what stage the case is at whose purpose is to inform the court about the stage the case is at in the proceedings. ‘The case is for mention.’ This is followed by a request, ‘may another date of

mention be set' or 'may a date of trial be set?' This is followed by further information of the court 'the accused is remanded in custody your worship' and 'the matter is still under investigation,' and 'The accused person is not in attendance.' The stages of Self introductions, announcement of stage of proceedings and the request for the court's action to further the processing of the case are obligatory and follow each other in this set order. After these stages in the text, the further information for the court is optional. By this move the court is given various kinds of information, for example, 'this case was supposed to be...' or 'the accused is remanded in custody,' or 'the accused is not in attendance,' or 'the accused is out on bail,' or a more extended explanation, 'the accused person is not in attendance during the last mention, a warrant of his arrest was applied for. May another date be set, your worship as we are likely to arrest him.'

This structure captures the essence of the definition of genre as staged, goal-oriented social process, a social process by which the court prepares to carry out its mandate to settle disputes, which mandate is honoured in the substantive stages of the trial

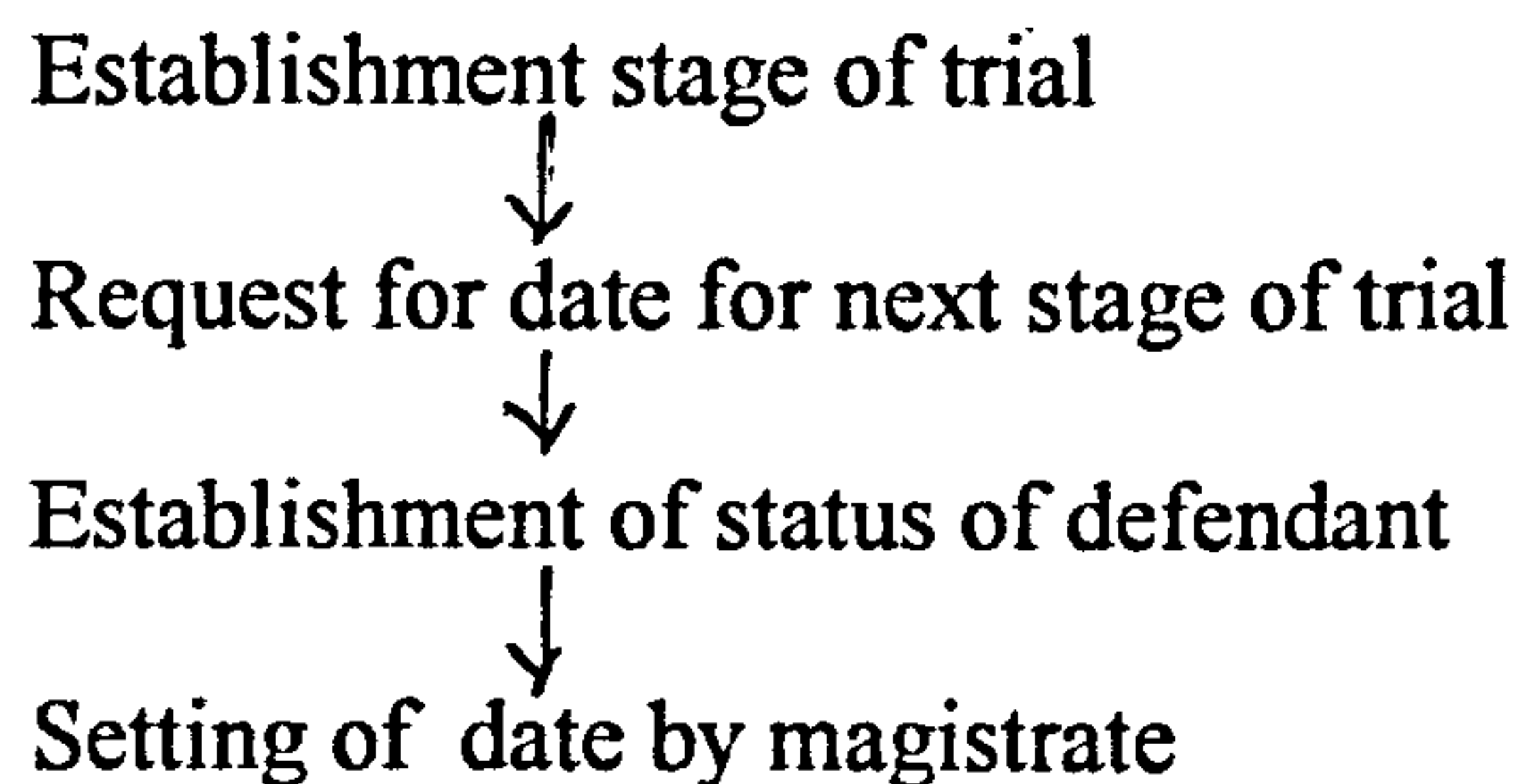
The basic structure of the stages is:

I appear for the state your worship.
 The matter is for mention.
 I apply for another date of mention to be set.
 The accused is remanded in custody.
 Magistrate set and announces date

This translates into the theoretical generic structure:

Self-introduction of prosecutor





The development of the mentions stage involves various activities by the magistrate and sometimes a dialogue initiated by the magistrate whose aim is to elicit details that the magistrate needs to establish. This is the type of dialogue excerpted at the beginning of this discussion of mentions. The activities by the magistrate represent non-verbal responses to the Prosecutors opening. These include checking the court diary and looking up dates on the calendar usually pinned up on the wall opposite his or her seat. The magistrate then closes the dialogues by announcing the date of the next stage of the case and checking that the accused person has understood what was said. Some wordings of the magistrate's closing are:

Mag: This case is scheduled for the 24th of November at 8.30 in the morning. Make sure you notify your lawyer.

Or

Mag: So how about setting the date for the next appearance. Here are the dates. The case will be heard on the 16th, 17th, and 18th of September. So make sure that you don't miss this one.

Or

Mag: You will be granted bail for one thousand Pula. You will report to the police twice a week on Tuesdays and Fridays at 7.30 a.m. Trial 18th November. Do you understand?

Or

Mag: Accused, you have heard my explanation with regard to the availability of judicial officers. 8th September.

The magistrate's turn involves the mandatory move of announcing the date for next proceedings on the case and some optional moves addressing the accused person. The accused persons' responses are again minimal being either a clearly heard 'Yes' or a mere grunt as acknowledgement of understanding. The prosecutor always responds to this closing of the mentions stage by thanking the magistrate or deferring to the court decision with, 'If it pleases the court.'

5.3.3.2 The grammar of the Mention

The first inform move that follows the self-introductions is the announcement of the stage of the case. We saw, in the table, the various realisations of the self-introduction stage. The grammatical realisation of the first inform stage is a simple SVC (subject verb complement) – 'this matter is a mention,' 'It's a mention.' Or a more elaborate structure, 'This case is coming for mention.' The request moves that follow the announcements always relates to the setting of further dates of mentions or dates for trial. These request are realised grammatically by the modal 'may' or a more elaborate structure like 'I am applying for another date of mention to be set,' being the language of polite requests.

The grammatical structure of the text is a number of single, short, unconjoined sentences, strongly suggesting that these are different stages of

the text. There is some variation between prosecutors as to the order of the stages. Cases numbers 14 and 15 realise the same structure slightly differently in that they employ some conjoining:

I appear for the state. The case is coming for mention and I apply for another date. Excerpt 3. Case no. 14 06-08-99

Case number 15 employs even more conjoining.

I appear for the state your worship. The case is coming for mention. The accused is remanded in custody and I apply for further detention and yet another date of mention.

This is an unusual structure in the Mention in that it deviates from the structure discussed above while there is no specific explanation for doing so.

5.3.3.3 The court context for mentions

The explanation for this kind of simplicity of grammatical structure seems to lie in the demand for clarity, order and brevity which allows for the normal business of the day to be carried out as swiftly as possible. I have not come across a description of this stage of court proceedings. This is probably because most descriptions of court proceedings have concentrated on the later body of the trial like questioning in examinations and jury instructions. This may lie in the differences between organisation of the courts in Botswana and places like the UK. In Coventry, for example, there are two separate courts for dealing with mentions and trials. The courts are in the vicinity of each other and when I visited them in May 1999, the usher informed me that the County Court was a ‘fast moving court.’ It turned out

that in the space of a morning, at least two hours, the court processed as many as five cases because it only performed the preliminary, preparatory work of mentioning the case, granting or refusing bail, setting the dates of trial, making decisions to withdraw cases or commit cases to the Crown Court for trial. In Botswana both trials and mentions are handled in the same courtroom and at the same sitting.

The daily administrative business of any organisation, the courtroom included, seems to require clarity and conventionalised processes such as the ones described in this genre. Thus routine is seen as an enabling rather than a deadening element of day-to-day business. This concept of routine will be further elaborated under the genre of Direct Examinations in this thesis where it comes out more clearly as facilitative of the proceedings in that when routine is inadvertently interrupted, the proceedings are adversely affected.

A further element of the Botswana context of the courtroom is the language of the proceedings. As the official and statutory language of the magistrates' courts is English, the administrative function is carried out in English and the accused is informed of the date by the clerk who interprets that aspect of the proceedings to the accused person.

Observation of the nature of English used at this stage run counter to the popular criticisms of the language of law as unnecessarily complex and inscrutable. This is probably because of the spoken nature of the language

although it has been observed by other researchers that the language of jury instructions in the United States for example, though spoken, is hardly comprehensible (O'Barr 1982 p.388). He points out, from Mellinkoff(1963), that 'lack of clarity' is another characteristic of legal English as in the jury instruction that follows:

You are instructed that contributory negligence in its legal significance is such an act as omission on the part of the plaintiff amounting to a want of ordinary care and prudence as occurring and co-operating with some negligent act of the defendant was proximate cause of the collision which resulted in the injuries or damages complained of. It may be described as such negligence on the part of the plaintiff, if found to exist, as helped to produce the injury or the damages complained of, and if you find from the preponderance of all the evidence in either of these cases defendant was guilty of any negligence that helped proximately to bring about or produce the injuries of which plaintiff complains of, then in such a case the plaintiff cannot recover. (O'Barr 1982 p.388).

Communication by the prosecutors to the magistrates in mentions stage of court proceedings just described stands out in stark simplicity compared to communication by the judge to the jury in this extract. It would be interesting to find out why the language of the judge in American jury instructions is so inscrutable, perhaps from the practitioners of the genre themselves.

5.3.3.4 The content of the communication process

Finally what is communicated in this sub-genre of courtroom discourse?

There is first the ideational content of the language where information is shared and facts are stated. Then there are expressions of attitude as in the formality of language used to address the magistrate. Finally role relations are clearly revealed when prosecutors and counsel introduce themselves and

when they defer to the magistrates' decisions with expressions like 'as the court pleases.' The defendant is involved in this administrative process only minimally as he is silent even when he is informed when next to appear in court. In this data his response is not heard either because he speaks so softly that the recording missed his 'Yes' or he makes no verbal response. This only serves to emphasise the fact that at this stage of the trial the court speaks largely to itself in preparation for handling the case.

5.4 The Reading of Charge Sheets

The reading of charge sheets is the second administrative process following the mentions stage. This means that when the prosecution are ready to proceed with the case, the next stage in the trial is to request that the accused person be arraigned and as soon as the magistrate agrees to this the court clerk asks the accused person what language he understands and proceeds to read the charge to him or her.

5.4.1 Description of the data

The data for analysis of Readings of Charge Sheets comprises three Charge Sheets. One in English and two in Setswana. In contrast to the language of mentions the language of the Readings of Charge sheets is the language of the defendant, not the language of the court. The nature of the bilingualism of this stage is fully discussed in Chapter 7.4.2. In this chapter we are mainly concerned with revealing the generic structure of the process of arraignment.

5.4.2 Analysis of the charge sheet genre

The opening of the stage of the reading of the charge sheet is an interaction involving at most four interlocutors, as in the following:

Excerpt 1. Tape No. 12 Case No. 29 29-03-99

Pros: I appear for the State, Your Worship. Our investigations are complete.
Mag: Lets have the accused plead to the charge.
Int: Stand up accused. What language do you speak?
Acc: English.

This multi-party dialogue involves a certain kind of knowledge of court procedure on the part of the court personnel, the prosecutor, the magistrate and the interpreter. Thus the introduction of the process can be accomplished jointly as in the first three turns just shown above, or it can be done by only two people, the prosecutor and the court clerk-cum-interpreter, as in the next charge sheet reading:

Excerpt 2. Tape No. 6 Case No.4 18-01 –2000

Pros: Your Worship I appear for the State. The matter is scheduled for trial today... (a request for amendment to charge sheet)... as a result I would like the accused to be arraigned.
Court Clerk/Int: Emang ka dinao.
 (Stand up accused persons.)
 (The accused persons stand up)
Court Clerk/Int: Mosekisiwa wa ntlha maina a gago ke...
 (First accused your names are...

Although it evinces typical courtroom dialogue, the opening of the reading of charge sheet is quite fluid or flexible involving three or four people who all know the processes and therefore co-operate in the opening. The next stage, after the opening, however is more strictly structured and conventionalised and involves only the court clerk and the accused person(s). The first few turns between the court clerk and the accused person have the purpose of establishing the identity of the accused person.

Excerpt 3. Tape No. 12 Case No.29 29-03-99

Court Clerk: You are L.M.

Acc: Yes.

Court Clerk: You Stay at House Number etc (details omitted)

Acc: Yes.

Court clerk: You are unemployed.

Acc: Yes.

The second stage of the reading of the charge sheet is lengthier and involves the reading of the charge to the accused person at the end of which he or she must plead to the charge. It begins with stating the charge the accused is facing (You are charged with.) Immediately following this point of informing the accused is the reading of the charge sheet to him or her. The charge sheet is an intriguing text in a number of ways. First, though it begins with 'it is alleged that' it makes a very strong, direct accusation expressed in deictic terms. The statement of accusation selects from the grammatical system of deixis. Deixis is defined in Trask (1993)'s *A dictionary of Grammatical Terms in Linguistics* as 'reference by a term forming part of a system expressing deictic category' He defines deictic category as 'any

grammatical category which serves to express distinctions in terms of orientation within the immediate context of the utterance' and argues that deictic categories are those that make crucial reference to such factors as time or place of speaking or the identity or location of the speaker, the addressee or other entities. Among the most frequent deictic categories are those of person, tense and deictic position (Trask 1993 p.75).

The deictic categories of courtroom accusations are mainly those of person and time. The charge sheet is expressed in what Trask (1999) in his *Key Concepts in Language and Linguistics* terms 'linguistic finger pointing.' He says that 'a deictic category is literally, a 'pointing' category. It allows the speaker to 'point' at particular times, places and individuals' (p.68). By its selection from the grammar of deixis, the charge sheet is thus almost pictorially pointing a finger at the accused and pointing at the times and places of the alleged misdemeanour. The repeated use of the person deictic category 'you' gives the charge sheet the character of strong accusatory spoken text. More over, the stress and intonation of the court clerk added to the grammatically signalled accusatory tone. This element of courtroom narrative distinguishes them from narratives created for aesthetic /entertainment value. The charge sheet also selects the time deixis of the past tense, emphasising the story aspect of charge sheets which relate to the imputed past action of the accused. The following excerpts demonstrate this pointing function with the underlined words being place, person and time deictic categories.

Excerpt 4

Court Clerk: It is alleged that on the 19th day of October 1998, at the Ramotswa National Registration Office in the South East Administration District, you gave false information to the Registrar of the National Registration that you were a Motswana born in Matsilobjoe village and intending thereby to cause the Registrar to issue you with a Botswana National Identity Card an act which the registrar would not have done if he was aware of the true state of facts. (Tape no. 12 case no. 29 o3-09-99)

Another charge sheet confirms the charge sheet as always similarly worded and structured with the same linguistic features of deixis.

Excerpt 5

Court Clerk: You are K.D. You are 33years old. You stay at House Number 9158 at Jinja in Gaborone. You are facing a charge of stealing with force. On the 30th October 1999 at Jinja you stole forcefully the sum of P600 from M. I. You hit him with your fists. Do you understand?

Such strong incrimination demands from the accused an equally strong self-defence or as is most usual in contested cases, defence by powerful counsel. This defence begins with the accused pleading to the charge (s) and proceeds directly to the evidence for such charge(s). The opening of the proceedings of the case represent, therefore, the powerful acts of accusation and defense of the defendant in the trial. The substantive trial processes are introduced immediately following the arraignment with responses from prosecutors such as ‘Your Worship, we have completed our investigations. We intend to call 4 witnesses in this matter. May the case be set for trial?’

5.5 The Reading of Facts: The Narrative genre

The Readings of Facts are the last stages of the trial functioning administratively to prepare the court to hear the judgement on the case. The texts of the Readings of facts are wholly narrative in structure as they recount the stories that gave rise to the court cases. One dialogue between the magistrate and the accused person in the data relating to these narratives seems to me to neatly encapsulate the meaning of the reading of the facts as seen by the magistrate. He engages the accused in the following dialogue:

Mag: You will remember that on the 2nd of this month, you pleaded guilty to several counts? Driving a car dangerously, secondly driving without a drivers licence, thirdly driving without due care as well as driving without a valid drivers licence? You remember you pleaded guilty to these charges?

Acc: Yes.

Mag: Do you still plead guilty to the charges?

Acc: Yes.

Mag: Alright, listen then very carefully to the reading of the facts of the case.

This dialogue seems significant in revealing the reason for this genre of the trial, which is to recapitulate the story in the trial to aid everyone's memory, especially necessary after the substantially lengthy processes of examinations and submissions and also probably after the breaks in the trial during adjournments. The facts are read by the prosecutor whose role in the court seems also to attach to administrative duties.

The model of narrative described by Kress (1993 p.32), linking narrative to genre as staged, goal oriented social process fits the courtroom narrative of Readings of Facts so adequately that we need go no further in search of narrative models to analyse these texts. I am aware of the existence in the

literature of many models, all of which rely on stages of the genre. It seems to me however that all models are showing the same elements of narrative structure even though they label them variously depending on the disciplinary origin of the models. Cortazzi (1993), for example, describes these models from the disciplines concerned such as sociological and sociolinguistic models of narrative, psychological models of narrative, literary model of narratives and anthropological models of narrative. Kress (1993)’s linkage of narrative genre to the basic definition of genre as purposes and stages of the social process is attractive.

The first Readings of Facts to be described is one that seems to me to be typical of this courtroom narrative. I borrow from Kress (1993) the term ‘algorithm of the sequential unfolding’ of the text, which involves initial equilibrium – disturbance of equilibrium – conflict or tension – resolution of conflict – re-establishment of equilibrium from Kress (1993) and display the unfolding of the story in the Reading of Facts.

Speaker	Transcribed talk	Stage
Prosecutor	The accused is as named in the charge sheet. He is charged with two counts of breaking and stealing.	establishment of main character
	The complainant, X resides at house number XXX Phase Two, Gaborone.	Setting
	On the evening of the 17 th she accompanied her younger sister to their home in Kanye. They came back on the 18 th July 1999 in the evening.	Equilibrium
	On arrival she noticed that the kitchen lock had been broken. She then suspected that someone may have broken into their house	Disturbance of equilibrium

in her absence. She the started her observations within the house. She realised that her property already exhibited in the charge sheet had been stolen.

She went to report the matter to the G-West Police Station, who investigated.	Conflict Tension
---	-----------------------------

On the 13 th of August the investigating officer Inspector K. was given those properties and the accused by Sergeant M. When the accused was confronted with the allegation, he admitted that he broke into the lady’s house and stole the property.	Resolution of conflict
---	-----------------------------------

He was then charged as charged and we tender the goods as evidence.	re-estab- lishment of new new equi- librium
---	--

Conclusion

If we analogise between the legal profession and other social organisations we will find that it is both different and the same as any other organisation. The similarity is that lawyers, the police and magistrate belong to a particular abstracted entity but unlike other organisations, they are largely autonomous as individuals. However, as Mead (1985:22) says, ‘magistrates have a governing authority (Weber 1947:146), and are responsible for directing the corporate activity’ (ibid.147). What all the foregoing description of language in the courtroom as a social organisation reveals is that any type of organisation ‘exists in so far as their members create them through discourse’ (Munby 1997:181). By analysing the language of professions and organisation, we are able to better understand how ‘through discourse, people

accomplish the everyday task of functioning as part of large coordinated institutional structures' Munby (1997:181). Thus the administrative processes are the everyday routine discourses enabling the 'everyday task' of the courtroom functioning as an institution.

CHAPTER 6 SUBSTANTIVE PROCESSES 1: The monologues of Submissions and Judgements

6.1 Introduction

In Chapter 4 of this thesis, I introduced the notion of there being two classes of courtroom communication processes, namely administrative and substantive processes. The substantive processes further divide into monologues and dialogues. This chapter introduces the analysis and discussion of the processes of submissions and judgements. Although the submissions and judgements come later than examinations in the trial process, to create cohesion in the later parts of the thesis, I shall deal with the submissions and judgements first. This will help maintain the link between the chapter on the examinations transactions and the chapter on bilingualism because the uses of different languages in the courtroom takes place in the context of the dialogues of examinations, as well as the administrative processes of readings of charge sheets and readings of facts.

The main rhetorical link between the processes of examinations, submissions and judgements is the fact of their sharing the same purpose, being that of persuasion in the courtroom. The whole process of the trial is really an argument between the opposing parties about the truthfulness of the prosecution story. The outcome of the trial depends essentially on the persuasive skills of the oppositionists in the trial. This chapter of this thesis therefore makes the theories of the trial as storytelling and as persuasion central to the analysis of the data of submissions and judgements. This

centrality of rhetoric and narrative to courtroom processes is legitimate and now well documented. Brooks and Gerwitz (1996) have edited a volume called *Law's Stories*, in which nineteen writers have contributed chapters examining many aspects of narrative in the law or narrative and the law.

Gerwitz (1996 p.5) points out that:

'The consideration of narrative in law must take explicit account of the distinctive context within which legal narratives occur. Story telling in law is narrative within a culture of argument. Virtually everyone in the legal culture – whether a trial lawyer presenting her case to a court or jury, a judge announcing his findings about what happened in the case, even a law professor writing an article – is explicitly or implicitly making an argument and trying to persuade. Storytelling is, or is made to function as, argument.'

Thus this thesis takes a much acclaimed theory of the trial - that originating with Bennett and Fieldman (1981) and echoed, albeit without mentioning these authors, in the Yale Law School's 1995 symposium on narrative and rhetoric in the law. Two groups of contributors to *Law's Stories*, focus on trials and narrative transactions (mostly criminal trials), one group considering the construction of cases, that is, how lawyers, witnesses and judges put together and communicate stories at trial, and the other focusing on narratives that courts have considered problematic... in particular confessions and victim impact evidence. My application of this theory is to the trial stages of examinations, submissions and judgements.

6.2 The place of narrative in courtroom communication

That narrative should turn up as an important element of courtroom communication is not surprising as one of the most intriguing aspects of the genre narrative is its ubiquity. 'Narratives are the most frequently occurring and ubiquitous forms of discourse. Stories of personal experience, for example, crop up repeatedly in informal conversation, in doctor-patient talk, in the proceedings of law courts, in psychotherapy sessions, in newspaper reporting and in social science research interviews' (Cortazzi 1994). It has been suggested by narratologists that narrative is a basic means of human organisation of information for everyday sense making of experience Georgapoulou and Goutsos (2000). These writers point out that traditional views of narrative suggest that narrative is 'a primary mode...since it forms a constitutive element of human experience and reality (p.70). Ochs (1997 p.193) even proposes that 'the capacity to create and decipher plots is a quintessential faculty of the human species' and reports that Jerome Bruner (1990), 'has proposed that narrative is a basic instrument of folk psychology' (also Cortazzi 1994p.157). Georgapoulou and Goutsos (2000) quote the proponents of the primacy of the narrative mode as stating that narrative is 'central to our essential cognitive activities; to historical thinking; to psychological analysis and practice.' Fischer (1987) (cited in Georgapoulou and Goutsos 2000 p.68) has even coined the term *homo narrans* to underline the importance of narrative to human thinking. In their criticism of these traditional views of narrative, Georgapoulou and Goutsos argue that these views are idealisations arising from the standardisation achieved by a long tradition of the study of narrative. But their own attempts to free the conceptualisation of narrative from the traditional romantic views fail as they

eventually come round (after suggesting that they would propose a ‘more scientific analytical consideration of both narrative and non-narrative modes,’ to the recognition that the narrative mode ‘seems to enter into all kinds of interaction’ (p.75). In fact, as Cortazzi (1994 p.57) puts it, ‘narrative structures are used to interpret an ever widening range of human experience.’

It is for reasons of this ubiquitous nature of narrative that it is not surprising that it should crop up as a tool of argumentation and persuasive intent in the courtroom. Narrative is the organising principle of the whole trial process. The manner of adducing evidence is basically by telling the stories of different participants, especially the stories relating the events that gave rise to that litigation. Stories are also told in the submissions by counsel, mainly the story of the trial itself – what different witnesses have said- and counsels’ opinions about how the stories are to be interpreted and which story is to be upheld in judgement, whether the story of the prosecution or that of the defense. Boje (1991 p.106) recognises this role of narrative when he discusses the role of storytelling in organisations other than the courtroom. He states that stories are ‘the institutional memory system of the organisation’ and makes a parallel between courtroom story telling and storytelling in other organisations when he states that, ‘stories are to the storytelling system what precedent cases are to the judicial system. Just as in courtrooms, stories are performed among stakeholders to make sense of an equivocal situation.’

Finally, relating narrative and the law, Brooks (1996) points out that narrative ‘appears to be one of our large, all-pervasive ways of organising and speaking the world - the way we make sense of meanings that unfold in and through time’ and that ‘the law, focused on putting facts in the world into coherent form and presenting them persuasively – to make a ‘case’ – must always be intimately intertwined with narrative and rhetoric’ (p.14).

6.2.1 Stages in the persuasion process

The trial process as a whole is characterised by the attempts by opposing parties to persuade or convince the judge, in the context of this study, the magistrate, to judge the case in either side’s favour. This is done mainly through storytelling on the side of the prosecution and the challenging of the story told, by the defense counsel. In the absence of opening speeches by parties to the court, as in the data of this courtroom, the examinations are the first processes to initiate the persuasion attempts. They do this through the process of storytelling (Bennet and Fieldman 1981). The importance of telling a good story in court is also underlined by the law lecturer I interviewed at the University of Botswana. Who responded to my question on how lawyers are trained for court practice in these words:

So what do we teach them? To tell a story, basically. What you do in a court of law is to tell the court a story in accordance with your theory. You tell a very light story with nice continuity and the like. But make sure you tell a very convincing story to the judge, that is a coherent story, so that at the end of the day you can convince the judge, because your duty as a litigator or as

an advocate is to convince the court that your case or your point of view is the correct one. You have to know how to deal with your witnesses but the structure is as follows. Normally you have to make an opening statement. You just give the court, in broad strokes what a picture of what you are going to tell them. Like a good introduction into the true story itself. Then after the opening statement you call in the witnesses themselves who are going to give the meat or substance to the opening statement. The witnesses, first of all you examine them, what is called examination-in-chief. So in this examination-in-chief you ask the witness a series of questions geared at developing a particular point of view. You must form a very good chain of events and a very coherent picture. (A University of Botswana law lecturer, 2000).

This quotation outlines two very important points, that storytelling in the courtroom is the way of presenting the facts of the case and that the aim of this presentation is to persuade or convince the judge of the correctness of their side of the story. This process of persuasion begins with the first substantive communicative process – examinations (the story-in-the-trial) and culminates with the judge telling (the story-of-the-trial) in which he exercises his right to view the trial stories in his own way (Maley 1994p.47).

The important question to ask here is why the medium of narrative is such a powerful organising device for the process of adjudication. The answer is that ‘stories of the sort people tell in everyday life help organize information presented in criminal trials so that they can be evaluated by jurors,’ (or in this case magistrates) (Bennet and Fieldman 1981 p.ix also Lloyd-bostock1988 p.45). These researchers point out that without the story framework it would be very difficult for decision-makers to retain and use the large bodies of information generated within the trial for the purpose of judgement. Bennet and Fiedman point out that the ‘judgement process is a demanding one that must take into account large amounts of information and process that

information in ways that conform to norms of justice and legal requirements.’ (p.8) So how does the story as a form aid in this process? ‘First, stories help solve the problems of information load in trials by making it possible for individuals continuously to organize and reorganize large amounts of constantly changing information.’ And ‘Evidence gains coherence through categorical connections to story elements such as time frames, the characters, the motives, the settings and the means. (p.8) ... ‘Once the basic plot outline of a story begins to emerge, it is possible to integrate information that is presented in the form of subplots, time disjuncture or multiple perspective on the same scene.’(p.8) ‘In trials cases often unfold in complex and disjointed fashion ... and the juror or spectator in a trial may be confronted with conflicting testimony, disorienting time lapses, the piecemeal reconstruction of a scene from the perspectives of many witnesses and experts, and a confusing array of subplots (p.9). Without the aid of an analytical device such as the story, the disjointed presentation of information in trials would be difficult, if not impossible, to assimilate (p.9) In this way judgements rely heavily on the stories told and their plausibility, to ‘pass the test of reasonable doubt.’ (p.9)

Bennett and Fieldman further elucidate the functioning of the story in making judgements by pointing out that:

The structural form of a completely specified story alerts interpreter to descriptive information in a story that might be missing and which, if filled in, could alter the significance of the action. The inadequate development of setting, character, means or motives, can as any literature student knows, render the story’s action ambiguous. In a novel or film, such ambiguity may

be an aesthetic flaw. In the trial, it is grounds for reasonable doubt' (ibid p.10)

This applies equally to judges and jurors decisions at courts of first mention as well at appellate courts. For example, a case decided by a jury 'beyond reasonable doubt', can go to appeal and have the narrative that won out in the courtroom reversed. This is possible because appeal court judges look for judicial error, or story or events overlooked or excluded from the jury's attention...or items wrongly given the status of events (Brooks 1996 p.18).

This theory is a powerful and plausible way of arriving at an understanding of how judgements are made. It is also a theory that is subscribed to by legal practitioners themselves, as a validation exercise I carried out in September 2000 revealed. The law lecturer I interviewed confirmed the view by other researchers that the trial, as lengthy a process as it may be, is basically 'organised around storytelling' and that the opposing sides' struggles over facts definitions and interpretations of the same incident, 'become the hard substances of judgement,' (Bennet and Fieldman 1981 p.10). For stories to play such a crucial role in courtrooms' search for the right verdict, the teller of the stories must be highly competent in the telling. In fact these competencies relate basically to the lawyers arguing the case. They have to have clear conceptions of their roles and how to carry these roles out, thus the following discussion of the mandates of opposing counsel in the trial.

6.3 The prosecution and defense strategies of persuasion

One good description of the strategies of persuasion is that made by Bennet and Fieldman (1981) in their discussion of the purposes of prosecutors and those of counsel in the courtroom. They posit a theory of courtroom processes as the building up of stories whose aim is to persuade judgement to favour their side. They say that, 'It is clear from patterns of opening and closing remarks of opposing counsel and examination practice that both sides struggle to redefine facts consistently in the direction that best establishes their competing claims about the incident (Bennet and Fieldman (1981 p.93).

Relating to the roles of the prosecution and defense in the trial, Bennett and Fieldman (1981) point out that, the obligation of prosecution is to prove the guilt of the defendant beyond reasonable doubt. To carryout this mandate,

'All prosecution cases must attempt to construct a structurally complete story that constrains an internally consistent interpretation for the defendant's behaviour. This means that prosecution cases must develop an action through a clear set of scenes, actors, agencies and purposes that can be connected in support of the same interpretation of the defendant's behaviour. The prosecution case cannot satisfy the standards of reasonable doubt if it fails to define all the structural story elements (scene, act, agent, agency, purpose) in terms that support the same meaning of the defendant's behaviour' (ibid p.94).

The defense's mandate, on the other hand is to respond to the prosecution case in order to create reasonable doubt. And this can be done by 'exploiting different properties of the prosecution story' (Bennet and Fieldman 1981 p. 98). Their strategies therefore are ways of dealing with the prosecution story. According to Bennet and Fieldman, the defence does not have to prove the defendant's innocence and therefore the strategy of constructing a complete story of its own is only one option.

The defense has three general strategies that it can employ in response to the prosecution case, namely the challenge strategy, the redefinition strategy and the reconstruction strategy. The challenge strategy is employed if the prosecution has not constructed a structurally complete or internally consistent story. Here the defense may choose to merely 'show the missing elements in the prosecution case or that the definition of the various scenes, acts, actors, agents or purposes do not all support the same interpretation of the defence's behaviour.' 'If the prosecution case represents an adequate story in its own right,' the defense may use a second strategy 'involving the redefinition of particular elements in the story to show that a different meaning emerges when slight changes are made to the interpretation of the evidence.' In cases where the defense finds it difficult to challenge or reinterpret the prosecution story, and, it may elect to tell a story of its own. 'Under this third strategy the defence may introduce its own evidence in order to tell a completely different story about the defendant's behaviour.' (Bennet and Fieldman 1981 p. 94)

The story theory is a powerful instrument of explanation for the processes of proving and disproving a case and we have seen how it is an element of the trial in all its various stages. However Examinations in court are described in this thesis by an entirely different model of discourse analysis for reasons that as dialogues they exhibit the characteristics most defined in the Sinclair and Coulthard (1975) and for purposes of discussing the social underpinnings of courtroom discourse this model has been found most productive. Because

this process is substantially different from the other substantive courtroom processes, it will be discussed in a separate chapter, chapter 7. I shall here therefore proceed to discuss the monologues of submissions and judgements in the order in which they appear in the trial, that is submissions first.

6.4 Courtroom Submissions

The closing remarks of opposing counsel, otherwise known as summations in the United States or submissions in Botswana, are an area of the study of courtroom discourse that is not as well subscribed as the study of power relations as evidenced by the processes of examination in the courtroom. Major researchers in the field of language and the law such as O'Barr and his colleagues at the Duke University Law Project in The United States, Danet, Wodak, Gibbons, Shuy, Atkinson and Drew, Walker and others, have said nothing at all about the monologues in the courtroom. Even overviews of the field such as that by Danet (1990) and Mertz (1992) do not indicate that there is substantial literature on this topic. In her chapter, in Howard and Giles (1990), 'Handbook of Language and Social Psychology, entitled Language and Law: An Overview of 15 Years of Research, Danet does mention Goldberg (1986)'s work on attorneys' summations. In fact this work is a PhD dissertation entitled *A Jury Summation as a Speech Genre: An ethnomethodological study of what it means to those who use it*, submitted to The University of Pennsylvania.

Danet and Bogoch (1980) have this to say about what in the magistrate's court of this study is termed 'submissions': 'In trials as we know them the

effort to convince or persuade the other side (or strictly speaking the decision-maker, in this case) that one's beliefs should prevail is most apparent in the in the opening and closing statements when attorneys may directly address the decision-maker, whether judge or jury. Only here, and not during questioning of witnesses may lawyers assert, claim, exhort.'(Danet and Bogoch 1980 p. 39)

But having said this they do not then go on to examine or subject these genres of courtroom discourse to any analysis, as indeed they say about their study that, 'Our main focus is on the nature and functions of questioning in the courtroom,'(p.40) They continue to say that, 'The findings to be presented here are drawn from the analysis of six criminal court trials recorded in the Superior Court of Boston, Massachusetts in 1976. We take as our basic unit the question response sequence.'(p. 40) It is surprising that a study based on such extensive data would not widen their focus to treat the whole data, or that submissions did not come up as a potentially a worthy area of study. They report that their report was one of five other studies presented at the Symposium on Language and Law, International Conference on Language and Social Psychology, University of Bristol 1979,' but none of the papers focused on this element of courtroom discourse.

In her thesis, Goldberg (1985) examines the summation in a jury trial where the speeches are directed at juries and represent the final attempt by counsel to persuade the jury to judge the case in their favour. She describes the summation or closing speech to a jury as "an exercise in persuasion." (Jeans

1975).” While she claims that ‘the closing arguments are the chronological and psychological culmination of a jury trial,’ (p.1), however, in the non-jury context of the Botswana magistrates court the judgement is the chronological and psychological culmination of the trial. Here both the closing speeches and the judgements are integral to the trial. They both involve argument, and the trial is not over until the magistrate has made and argued his verdict.

As far as the summation is concerned, Goldberg points out that summing up for the judge or judges in appellate courts may involve different kinds of lawyer emphases. She points out that:

‘When a lawyer sums up to this court, the arguments are made not to naïve jurors, but to the judges who as former lawyers are educated in the law. Therefore many emotional issues are deleted and the focus is truly on argument (ibid p.290).

This statement by Goldberg (1985) is insightful even though it does not develop the idea of the basic differences between different kinds of people to whom speeches are directed. In fact, Bergoon and Bettinghaus (1980) develop this argument from a communication studies perspective, pointing out that ‘one of the oldest controversies in communication is whether a persuasive speaker is better advised to construct messages based on peoples’ emotional needs (such as patriotism, love, self-interest etc.) or their rational bent (tending to respond best to well-constructed, logical arguments) (ibid p.143). They suggest a theoretical position in which they argue that the proponents of either emotionalism or rationalism differ fundamentally in their view of the ‘nature of humanity.’ This thesis will not go on to discuss

the argument as to which class of people are best persuaded by emotional rational appeal, that is, whether there is a basic difference in response to speeches between the highly educated, such as judges and those not educated (at least in the law) like jurors. In the area of courtroom persuasion it has been actually pointed out by several scholars that even judges are ‘human’ (Crowther 1984, Dobson and Fitzpatrick 1986, Napley 1987). This claim will be developed and put in perspective, later in this chapter in the section labelled ‘persuading the judge.’

Goldberg’s study is quantitative, using large samples of the population of lawyers and large samples of their responses to establish the regular feature of summations. She lists observed features by placing them under four categories: Their choice of words; Apart from words; Hearer response and topics for argument. Under choice of words are listed: A. Structural slots in the summation – opening words, signals closing, closing words. B. Small genres of speech – apologies, compliments, descriptions, enumerations, insults: other lawyer; witnesses, jokes, politeness formulae, requests, rhetorical questions, sarcastic comments, suggestions and urgings. C. Message forms – direct quotes, Latin used, memorised material and reads from written material. The section labelled ‘Apart from words’ makes a long lists of non verbal features of speech such as body motion used for emphasis, use of charts, photographs exhibits and maps, eye contact use of hands, etc. Hearer response includes a long list of adjectives used by the observer to describe tone of speaker such as angry, brusque, defensive, direct, dramatic, gentle, impassioned, informal, etc. The fourth category – Topics of argument

– includes a list and outlines four topics being – appeals to emotion, appeals to intellectual issues, legal definitions and refutational arguments including arguments which were made or might be made by opposing counsel.

Goldberg's thesis table of contents lists the following topics: A description of the summation according to trial lawyers; Summations in the words of the senders; Learning and teaching of ways of speaking like a lawyer. The first two chapters listed here involve a large list of quotation from lawyers' descriptions of what they think they are doing in the summation. I have found the really interesting chapter to be that describing the learning and teaching of speech making. In this chapter she decries the paucity of formal training of lawyers in speech making in modern law schools. She points out that 'The summation is considered by many in the legal profession to be a critical part of almost every jury trial,' and that it is therefore 'surprising how little formal instruction is offered to those in law school who will soon come to the bar. Until the last ten years or so, no instruction was available and even today it is but optional' (ibid p.9). In her survey of successful American lawyers in 1985, Goldberg reports that 71% of the lawyers said they learned to speak like a lawyer summing up by observing other lawyers and only 21% had learned it from books and 15% had learned public speaking from courses or debate in high school (ibid p.101). Accordingly I have not found a fully outlined syllabus on the teaching of persuasive skill at The University of Botswana, which trains and educates lawyers in courtroom practice including the teaching of persuasive skills in the year 2000. However, a lecturer I

interviewed on how they prepare law students for the composing and delivering of opening and closing speeches in the courtroom responded thus:

Interviewer: I want you to begin where in court practice you teach them the skills of speech making like opening and closing statements or submissions.

Respondent: Its not a theoretical subject as such, it's a very practice oriented course and normally what we teach them in practising, normally they deal with magistrates which are the audience they normally talk or argue to the court not with the court as they say. Then there is the other side, the adversary in the case, so he is also interested in as part of the audience and the gallery at large, but the key person you'll be arguing to or speaking to is the court itself, it may be the judge or the magistrate. So what do we teach them? To summarise the to tell a story basically what you do in a court of law is to tell a story in accordance with your theory. That is the goal of your speech. You tell a very light story with nice continuity and all the like but make sure that you tell a convincing story to the judge a coherent story so that at the end of the day you can convince the judge because your duty as a litigator or advocate is to convince the court that your case or point of view is the correct one so you have to be as persuasive as possible. And most professors retain this view of law especially Professor... Sir David Napley emphasises that advocacy is just that, it is the art of persuasion and you have to learn persuasion, you have to sound convincing.

The respondent then goes on to explain the relationships between all stages of the trial from the opening speeches, through examination to closing speeches.

He continues:

Respondent: After all the examination has been led now that is when the interesting part comes in that is where you have the closing arguments. Most people call it closing arguments but normally it is called summing up you sum up the whole case. Now why do you sum up? You sum up because there has been evidence-in-chief which was lead in by the party who starts, there has been cross-examination, questions have been asked which tried to impeach the examination-in-chief. Now there is the whole evidence, a mixture of facts and everything and exhibits, pictures, diagrams and photographs. Now the closing argument now that is when you get to the meat of the art of advocacy. Now, after having all these raw materials in the form of

evidence, now the lawyer comes in to convince the court that his version of the events is the correct one and that's when you have to show the court that you can be very persuasive. You have to be very, very tactful, you know it's an art... But normally you know about moves, to gesture, gesticulation, you have to convince, where to look and when to look there, how to do it. You must be able to shout if necessary. Sometimes you even have to know the personality of the judge and then appeal to his sentiments, to his heart, because they are human beings. Like Sir David Napley says that in most cases you have to be a very good student of psychology to understand how judges work. If you understand how they work, you say what they want to hear together with the facts. You have to understand the mechanics of persuasion.

6.4.1 Persuading the judge

However, while so little teaching takes place in law schools regarding making speeches in court, trial manuals themselves offer a great deal of sound advice on the art of persuasion in the courtroom. Dobson and Fitzpatrick (1986 p.18) advise the budding advocate that, 'When it comes to presentation of your case, one of the greatest virtues is a keen awareness of the way in which the judge's mind is working. For example never be afraid to abandon a point if it is proving a liability, or alternatively beef up the point if it appears to be more attractive to the judge than you had anticipated.' (p.18). Crowther advises his advocate to be 'selective in your argument. You do not have to throw in every point. Indeed be selective according to the idiosyncrasies of the judge.' He tells a story of a Judge before whom he appeared in Surrey years ago. He was appearing for a tenant in a rent case. His landlords wanted the house in which he and his family were living and offered them a flat instead. The issue was whether this was 'suitable alternative accommodation.' He says that 'the nature and frequency of the

judge's interruptions during my closing speech indicated clearly to me that I was losing. Suddenly, I remembered seeing a little snippet in the *Evening Standard* a few nights before of a dictum of this Judge, a great animal lover. "If there are no dogs in heaven," he had said, "I do not wish to go there." I turned to the defendant: "Have you got a dog?" I asked. "Yes, Why?" He exclaimed and looked at me as though I were completely mad. But I was back addressing the Judge. "And then Your Honour, there's the question of the dog. The dog would never be happy in this flat, with no garden, no trees..." The Judge's face brightened: Oh, there's a dog, is there? He smiled. "I didn't realise there was a dog. A dog is a member of an English family and as such is entitled to be considered. This flat would be quite unsuitable for the dog. I shall certainly not make an order" (Crowther 1984 p19).

This judgement is one that shows that judges are human and are liable to be persuaded by counsels' arguments even when they think themselves immune from the tactics and persuasive techniques of clever lawyers, as one magistrate in my study most emphatically disclaimed. She said that it is the content of the speech and the facts as adduced from the whole case and not the manner of presentation that convince her what ruling to make. However, as one of the respondents of my validation interviews pointed out, the art of persuasion is a feature of the whole proceedings from the opening speeches of counsel, through the fact finding of examinations to closing speeches of submissions. So the judge is being subjected to the process of persuasion throughout the trial. The law lecturer responded to my suggestion that

throughout the trial there are lots of mini-arguments and persuasion tactics that:

Respondent: Yah, numerous There's a lot, lots and lots of argument throughout the trial in between. Closing arguments now this is the importance of it, that it's the final, final argument that will take into account all the objections that you have made, all the argument, the nature of the witnesses how they behaved when they were in the witness box. Even when you make the your final argument you can tell the court that now please, if some witness's evidence was very dangerous to my case I'll say 'I'd urge your Lordship not to take account of the evidence given by so and so because that witness as you saw My Lord was in the witness box and was scared. He was not very free when he was giving evidence. He was stammering but normally he is not a person who stammers and his story was very inconsistent and I would urge Your Lordship not to agree with him. Something like that.'

My interview question as to whether the intellectual nature and standing of judges including being highly educated and, possibly, cynical, does not preclude them being persuaded by mere technique on the part of counsel was answered in this manner:

Respondent: Sometimes cases are borderline cases so if it is a borderline case it can go either way so you have to fight with all that you have. Sometimes, you know, judges are human beings; you know what they like and what they don't like.

The respondent went on to suggest things that may affect the judge's judgement like experience in court of various counsel and even the age of counsel and their educational background may affect the way the judges view them and their presentations in court. He says that this human dimension of adjudication works. But he does point out that, 'First you have to be grounded on the facts. They have to be at your fingertips, then the law which can be applied to those facts. And also you have to be skilled in the art of oral advocacy. 'It is also part and parcel of the whole lawyering process.'

Dobson and Fitzpatrick (1986 p. 21) do also point out that ‘There’s nothing that any book can say which compares with going through the experience yourself.’ However there are points that can be made to help the advocate judge for himself or herself what a good argument is like. First they caution the student of law and courtroom practitioner that ‘A hotchpotch of ideas will only leave the judge confused, not enlightened.’ On how to present their argument they say that, ‘there is much to be said for a contemplative approach arguing from a confined number of principles properly explained to the judge in careful measured tones backed up by a small number of crucial authorities. A well-presented argument’ they say, ‘begins with a limited number of submission of principles upon which your case is based. Each submission is then examined and developed on the basis of legislative, statutory interpretation of common law and policy considerations. Another point is that of order of presentation of the points in an argument. Here there are varying opinions like those of Walker, Thibaut and Andreoli (Order of presentation at Trial, Yale Law Journal 19 72-73) and those of Dobson and Fitzpatrick (1986). Dobson and Fitzpatrick advise the advocate to, ‘be careful to prepare your submission in a logical order. Some prefer a rigid order to their submission, but be careful to give your full weight to your strongest points. Dobson et al and Walker et al then differ on the order of presentation of points in the submission. Dobson et al suggest that ‘If possible and without undue contortion of your argument, lead with your strongest point, or at least one of your strongest.’ The reason they give for this order is that, ‘there is no point in exasperating the judge by leading with a series of barely

tenable points for the sake of completeness.’ (p.21) Walker et al on the other hand point out that ‘there is no established internal order for adversary proceedings; such an ordering is left entirely to the participants.

Nevertheless, they point out, ‘most practitioners normally save their strongest most convincing evidence for the last.’ (p. 216) The reasons for this order being that ‘it is the most dramatic way to present one’s case and that the jury or fact-finder will remember the strongest evidence more vividly.’

The difference of opinion here may lie in the fact that Dobson et al are giving advice to law students participating in moot courts. They say that Moots are organised on different principles from trials. And they give the reasons that ‘In a three day trial you must save your strongest for last but in a moot, the sands of time run quickly against you.’ (p.) So, it seems that the order of presentation of points in the submission is entirely discretionary and depends on the length of the trial. Advocacy, the writers of trial manuals say, is an art that develops in with courtroom experience on the part of the advocate. So, I conclude this section on the art of persuasion with a quotation from Dobson et al (1986 p. 21). They caution the advocate that, ‘No one can write a submission for you...no researcher can take the place of a mooter when it comes to the crunch of deciding what to put in, what to leave out and how to express yourself. Suffice it to say here that as your legal training progresses, the sophistication of your argument will increase.’

I shall in the next section of this chapter go into analysis of submissions texts collected in the courtroom of this research, focusing first on their linguistic

characteristics and, secondly, on their social purpose and their corresponding generic structure.

6.4.2 Analysis of submissions

The foregoing discussion has centred around the general conceptions of the language of submissions otherwise labelled summations of closing speeches in different local contexts. This section now proceeds to deal with the specific data of this courtroom. This data involves several texts of lawyers' submissions in the Botswana courtroom and is analysed in the background of the theories discussed in the preceding section for example the features of submissions discovered by other researchers and the models given in the court practice manuals cited. The analysis will focus on the language and the generic characteristics of submissions.

6.4.2.1 Linguistic features of submissions

Submissions, like examinations, are very interesting as they involve attempts by opposing sides to convince an audience, in Botswana's case, only the magistrate, that their side has the monopoly of truth. For this reason they use very strong language which is full of hyperbole or overstatement when counsel presents his own side's story and understatement when a negative observation is made by opposing counsel.

Defence counsel: My submission is that the mistake is not fatal. The court has the discretion to ignore such a little omission.

Defence Counsel: Your Worship uhm the case my learned friend is referring to is one in which there was clearly an abuse of process. And it is noted in the judgement thereof that there was substantial departure in the fundamental character of the cause to trial. However Your Worship, there are vital elements of the offence in question which require an insight of cross-examination to ensure that the ends of justice are met in a free, fair and equitable manner.

Defence Counsel: To what extent can we rely on his knowledge when he owns up to the court that certain features of the machine that was displayed he does not understand? ... Your Worship, the witness is not trained in the use of the machine. He was probably shown in three minutes that when you operate the machine this is what you do. If that is the case, any layman is in a position to operate the machine. Can we then rely on his evidence when he comes to court? Certainly not! Your Worship we submit with respect, that it means two things. First that the extent of his knowledge of as far as the machine is concerned is dismally limited.

Counsels own points are described as salient, while those of the opposition are full of discrepancies.

Counsel: Your Worship, I submit with respect, all these salient points would put in question the results.

Counsel: However, Your Worship, we'd like to submit that the effect of the successful objection to the production of the certificate is to cast serious doubt on the results of the printout...

Another characteristic of the language of submission is that of putting the magistrate at a very elevated position and using hyper-formal language in addressing him or her.

Counsel: Your Worship, we submit with respect, that pursuant to the successful objection

Counsel: Let me summarise, Your Worship, by making reference to the case of KB and the state. It being stated in the 1988 Botswana Law Report at page

102, judgement of the honourable judge, the late (inaudible). This statement is apposite to this case when he was dealing, Your Worship, with issues like traffic.

Counsel: Your Worship, in the case before us at present, the accused is a layperson and is not aware of the technicalities pertaining to and arising from conducting his own defence, as such, he has sought legal counsel. It is pertinent to observe that...

In their attempt to completely discredit the evidence or argument of the other side they also make very striking use of derision and sarcasm in referring to the efforts of the opposing side to win the magistrate to his or her side. For instance, one counsel, in his efforts to deprecate opposing side's evidence submitted that 'With respect, Your Worship, The time would be very ridiculous.' And, 'With the respect, Your Worship, this honourable court has not been favoured with an explanation of this discrepancy.' Or 'I will not belabour this court with the first submission.' Or 'The judgement that my learned friend is heavily relying on...' Counsel refer to each other as 'My learned friend' but all they do all the time is to disparage each other, for example, 'To use my learned friend's common terminology.' This makes the reference to each other as 'learned friend' sound sarcastic.

Another characteristic of counsels' language during submissions is that of use of colloquialisms. The interesting aspect of this characteristic is its contrast to the hyper-formal mode of addressing arguments to the magistrate. One counsel prayed that the other's affidavit be 'Thrown out through the open window.' And the other lawyer apparently smarting from this scathing attack, later referred to this statement as the other counsel's 'self-shooting' as he himself prayed that both of their affidavits be admitted. He said,

derisively, 'my learned friend has said my affidavit be thrown out of a window. I pray that his own also thrown out.' Other colloquialisms are statements like, 'Any attorney worth his salt,' '... be taken with a pinch of salt' and 'the long and the short of it.' The colloquialisms are probably triggered by the strong fighting stances that counsel take toward each other.

So we see here that some characteristics of the language of submissions are those of hyperbole and understatement, hyper-formality when addressing the magistrate, sarcasm and derisions of each others' attempts to convince the magistrate of the strengths of their cases and the colloquialisms that arise out of their 'fighting' attitudes to each other.

A final and characteristic element of counsel's final speeches or submissions is that of the routinised language or linguistic manners of counsel. It comprises in the frequently repeated modes of address like 'Your Worship,' repeated at intervals in the speech, 'My learned friend,' 'This honourable court' and the often repeated 'I submit with respect...' This can only be explained as courtroom culture, a way of behaving and relating to each other in court. These characteristics are represented in the literature such as the list of characteristics given by Goldberg (1985) including descriptions, and sarcastic comments.

6.4.2.2 Submissions as a genre of discourse

The linguistic features (mainly diction) of the submissions texts have been discussed. We turn now to a discussion of the generic, textual structuring of the texts, that is, the level of structure beyond the individual sentence structure. The submissions texts are seen as the unfolding of purposive stages each stage of the text serving a particular social purpose. These purposes and the textual structure they give rise to will be discussed in the next few sections of this chapter.

6.4.2.2.1 Social purpose and textual structure

Firstly, how is social purpose related to textual structure? Hence the subtitle social purpose and textual structure? This subtitle reflects a particular approach to linguistic analysis, that of genre analysis. As indicated in the statement of the methodology of data analysis of this research effort, genre analysis is one of the analytical perspectives adopted for this research effort (Specifically, it is Martin's (1992) approach that Kress (1993) describes as an approach which seeks to describe, 'the whole complex of factors which need to be described and understood about a text.' Kress (1993) says that the approach focuses most on the purposes of the participants who produce a text.

6.4.2.2 Textual structure

The texts of submissions to be largely purposive summaries of the stories developed in examinations evidence. In going through the data by colour coding the parts of the texts, the potential structure of submissions emerges.

Most beginnings included a statement of belief about the effectiveness of either side in proving or disproving the guilt of the defendant during the examination, most often at the beginning of the text.

Prosecutor: Your Worship, I wish to submit that the state has proved its case beyond reasonable doubt.

Prosecutor: We submit that the accused has a case to answer.

Prosecutor: On the basis of the above submissions, I submit that the state has proved its case against the accused beyond reasonable doubt.

Defence Counsel: We wish to make a submission that the accused person has no case to answer on all eight counts charged.

Defence Counsel: We humbly submit that the prosecution has not discharged its onus of proving the accused guilty on all eight charges.

After these beginnings there follow in both sides' submissions, reasons for the prosecution or defence claims.

Prosecutor: The evidence led by the state connects her to the animals, which are the subject of these proceedings.

Defence: The basis of our submission is that there is no evidence connecting the subject matter of the charges to the accused person. The goats which were identified by the court by their alleged owners have not been shown to have been recovered from the accused person.

Points of information for the court follow these claims and their reasons:

Prosecutor: The accused is facing eight counts of stealing stock. The state called twenty-two witnesses. The defence on the other hand called two

witnesses. The evidence of the accused and her mother is a complete denial of the charges.

Defence Counsel: Your worship eh the state in this matter has filed a charge of driving a motor vehicle whilst unfit against the accused person.

Then the main body of the argument is initiated. This involves recounting the events of the trial itself by reference to evidence elicited during examinations and how it should be used as a basis for favourable judgement for each side, i.e. reviewing the evidence.

Prosecutor: Rosie Van Nierkerk told the court that she purchased five sheep and three goats from the accused and these same goats and sheep were later identified by Prosecution witness number 1 and Mmanjo Ditodi as theirs.

Defense counsel: The evidence of Blackie is that on 07-02-99, when he got to the farm he was asked to slaughter and skin some goats and sheep. He stated that Mrs Van Nierkerk told him that she had bought the animals from the accused. Mrs Van Nierkerk told the court that when she came back from church in Selibe Phikwe, Blackie told her that the police had collected the animals saying they were stolen. It cannot therefore be said that such animals were the same animals that she had bought from the accused.

The defense counsel reasoning in this last excerpt is rather contorted but the point is made in this thesis that there is in submissions painstaking review of the evidence on which the arguments rest. The following Table highlights the structure of the submission genre.

STAGE	PURPOSE	EXAMPLE TEXT
OPENING: STATEMENT OF SUBMISSION	REMIND THE COURT OF THE CASE BEING ARGUED FOR OR AGAINST	Your Worship, I wish to submit that the state has proved its case beyond reasonable doubt. We wish to make the submission that the accused has no case to answer on all eight

		charges.
BASIS OF SUBMISSION	TO INTRODUCE LINE OF ARGUMENT	<p>The evidence led by The State connects her (the accused) to the animals that are the subject of the proceedings.</p> <p>The basis of our submissions is that there is no evidence connecting the subject matter of the charges to the accused person.</p>
STATEMENT OF CHARGES	TO REMIND THE COURT OF THE CHARGES	<p>The accused is facing eight counts of stealing stock.</p> <p>Your Worship, The State in this matter has filed a charge of driving a motor vehicle whilst unfit against the accused person.</p>
ARGUMENT: INVOLVING THE PROSECUTOR AND DEFENSE STRATEGIES	REVIEW EVIDENCE ELICITED DURING EXAMINATIONS TO ARGUE GUILT OR OTHERWISE OF DEFENDANT	<p>ROSIE Van Nierkirk told the court that she purchased five sheep and three goats from the accused person and these same goats and sheep were later identified by the prosecution witness number 1 and Manjo Ditodi as theirs.</p>
CLOSING: CONCLUSION	FINAL SUBMISSION: REINFORCE EITHER SIDE’S SUBMISSIONS	<p>With that Your Worship, we submit that the evidence adduced was sufficient enough to render reasonable to convict the accused personas charged.</p>

Table 8 Stages of the submissions genre

This table displays the major characteristics of the submissions as persuasive attempts through narrative, which I outlined at the beginning of this chapter, and as attested to by the literature on courtroom speeches. The first three stages – opening, basis of submission and statement of charges may be termed according to Labov (1972) the ‘Abstract,’ summarising the whole story. The fourth stage, arguments of the prosecutors and defense counsel begin by introducing the first event of either the prosecution or the defense story-of-the-trial. The rest of the events of either side’s story follow through to the complicating action. The conclusion evaluates the stories, i.e. the ‘point of the story is stated: ‘With that Your Worship, we submit that the evidence adduced was sufficient enough to render reasonable to convict the accused person as charged.’

6.5 Judgements as a courtroom genre

Judges and judicial decision making is an area of research which has not received much attention from researchers either of the psychological experimental approach like those of the Perspectives in Law and Psychology series edited by Bruce Dennis Sales in the early eighties, or the discourse analytic approach. However, three important contributions to the topic of judges and their roles and decisions, do indeed lay the framework for work in this area. These are the studies of Sales et al (1981) in the psychology

perspective and Maley (1994) in the discourse analysis perspectives and Bennet and Fieldman's (1981) in the narrative perspective.

Sales, Elwork and Siggs (1981) in their book entitled the Trial Process do point out that '...although the judge is equally if not more important than the jury in the trial process, relatively little experimental attention has been paid to his or her work.' (p.34) They then go on to outline the studies that had then been made. These include those studies that had 'focussed on the judge's role during formal adjudicative proceedings' (p.34). The one by Ryan et al 'points out that in addition to this stereotypic role, the state trial court judge must also engage in administration, affiliation, community relations, legal research and negotiations,' and they say that, 'To have a full understanding of judges and judging we must engage in research which takes into account all of these different roles' (p.34). The most studied of the activities of the judge is the jury instruction, which has been criticised for its complexity and inscrutability when it is considered that jurors are themselves ordinary users of language. We have discussed the genre judgement from a narrative perspective in 6.2.1 and have seen how the assessments of the trial stories and the characters of the magistrates doing the assessing characterise judgements. Although objectivity of judgement is intuitively the most important element in our sense of what is just and unjust, and underlies the fact that the judge must himself or herself argue for his or her own decisions, human factors do also intervene in judgements. We noted in the submissions section how judges can be manipulated by very skilled advocates' arguments. This is not to say however that all judgement is

idiosyncratic, as indeed judgements are reasoned and argued by the judges themselves who have to convince the audience he knows he has in court, especially the parties to court, as well as the court itself of the reasonableness of their judgements. The demands of justice require this reasoning. Which point brings us now, in the discussion of judgements as a genre, i.e. to the particular characteristics of judgements.

6.5.1 The generic structure of judgements

The present study is interested in judgements as a genre but in the non-jury context and will attempt to use the data, which comprises transcripts of judgements, to elucidate the structure and functions of judgements in the trial.

The first and important point to note is that ‘Judges give their decisions and orders verbally in court to the litigants involved’ (Maley 1994 p.42).

However,

‘In delivering judgements, appellate judges have in mind a wider audience than the individual litigant in the case which is before them’ (Kitto 1975 cited in Maley 1994 p.44), rather judges are thinking of the scrutiny of their peers both present and future’ and ‘if the judgement contains an important principle of law, then they may well be speaking to posterity. Even if they lack a taste for immortality, judges are well aware that their judgements can be confirmed or overturned in later cases, so there is a strong incentive to be careful and explicit, ‘(Maley 1994 p.44).

This is why judgements are stringently argued. Bhatia (1993) discusses the importance of reasoning in judgements stating that they are material for legal cases, which are the formalised written ‘abridged versions of court

judgements to be used by legal specialists whether they are law students or practicing lawyers.’ He states that legal cases are essentially tools used in the law classroom to train students in the skills of legal reasoning, argumentation and decision-making. This points to the necessity for careful statement and arguments in the judgement as they are meant to serve as precedents for subsequent cases. This point is made succinctly by Maley (1994 p.44) who states that ‘judicial decisions are an important source of law in common law countries, since the reasons for the decisions provide a precedent which can be applied to the facts of later cases.’ So judges have to reveal the reasoning processes by which they came to their decisions. Gerwitz (1996) points out that the judicial opinion ‘not only states what the court believes are the true facts of the case, but also sets forth an explanation and justification for the legal conclusion reached.’

As far as rhetorical structure is concerned, Maley (1994) points out that individual styles vary considerably in judgements but that because of ‘the social gravity of the occasion or speech event, a consistently lofty and formal tenor is typical’ and that ‘in English high courts formal modes of address like judges referring to their colleagues as ‘my noble and learned friend’ prevail. These descriptions hold equally well for the judgements made by magistrates

All judgements share a set of structural elements and therefore can be said to have a ‘generic structure potential’ (Maley 1994 p.44) also see Harris (1988) for a discussion of the concept. Bhatia (1987 p.230) explains this GSP of judgements very clearly as he points out that, ‘Almost all legal cases and

judgements available to date, and there are millions of them, consistently display a typical discourse organisation which is unique to this genre.' An integration of Bhatia and Maley's models yield the following stages of the genre judgements

1. Facts-an account of the events or relevant history of the case
2. Reasoning by the judge which may include a discussion of earlier relevant cases having a bearing on the one being considered, and the rules of law, if any applicable to the case.
3. The *ratio decidendi* of the case which is the principle of the law which is deducible from the case description and the arguments of the judge, normally laid down by the judge for application to other cases of similar or overlapping case descriptions
4. Ordering or the decision of the judge (Bhatia 1987 p.230 Bhatia 1993 p.136, Maley 1994 p. 44).

6.5.2 Purposes and functions of each stage of the judicial decision genre

Gerwitz (1996 p.10) states that:

Judicial opinion serves three main functions: first to give guidance to other judges, lawyers and the general public about what the law is; second, to discipline the judge's deliberative process with a public account of his or her decision, thus deterring error and corruption; and third, to persuade the court's audience that the court did the right thing.

The first stage of the judgement - the 'facts' stage - involves the judge summarising all the events both of the trial and of the stories told in the trial

by both sides and highlighting evidence basic to the judgement. Such a summary of the trial involves narrative both of the present case and of the events outside the courtroom which gave rise to the litigation. The narrative theory of the trial as we have seen was originated by Bennet and Fieldman (1981) and has been validated by my lawyer respondent and also Maley (1994) who erroneously ascribes the theory to Jackson (1988a). In his narrative the judge gives a version 'not only of the events that have given rise to the legal proceedings in the first place but as well narrative of the proceedings of the trial just completed, that is, facts from the examinations and views of the counsel in their speeches.' As indeed Jackson (1988) sees it, 'there is involved in the notion of trial as story not only the story-in- the-trial but the story-of-the-trial' In re-telling these stories, 'the judge exercises his right to view the case in his own way.' Maley (1994 p.47). The function or purpose of the facts stage is therefore to summarise the case and inform the courts which versions of the stories are, to him, believable on what basis. For example he will show the completeness of the stories, the contradictions in them and so on.

The rest of the stages, finding the rule supposedly contravened by the accused, reasoning and concluding, function to further inform the court on the decision made by the magistrate to either find the accused guilty or not guilty by showing the reasoning behind his finding. In this way, the judges ruling or order is given authority by the justification in the body of the judgement. Then the judge refers to the penal code for stipulated sentencing.

6.6 Analysis of Judgements

This part of the discussion of judgements in the court of law analyses the texts of judges' speeches against the backdrop of the theories advanced by the various researchers on courtroom processes, notably Bennet and Fieldman (1981) Maley (1994) and Jackson (1988). The narrative theory holds well when matched with the actual judgement texts of this study. A typical beginning of the text is the introduction of the story-in-the-trial. That is the stories constructed through examinations of various witnesses. The magistrate actually tells the court the story as he has picked it up from the trial proceedings.

Excerpt 1

Magistrate: The accused person is said to have on the 22nd of April 1999, along the road from Francistown, at Mmamashia, been involved in a road accident. The alcohol in his blood measured 3.1mg per litre of breath. And on a second count the accused on the 2nd of April this year at 11.30 am. Came driving a Toyota Corolla registered B... failed to stop at roadblock at Mmamashia. Among the officers manning the roadblock was X. He was the one talking to the accused to ask him for a road licence, sensed a strong smell of alcohol in his breath. He told the accused of his suspicion that he may have been driving whilst unfit due to consumption of alcohol. (Tape no. 7 Case no. 22 15-08-99)

Thus the magistrate pieces together the fragments of the narratives of the trial and presents it in one well structured account.

Excerpt 2

Magistrate: The witness said in his evidence that the (inaudible) and he flicked his lights signalling it to stop. However the vehicle did not stop. Sergeant PW 2 and Sergeant said they chased and caught up with the offending vehicle at another set of traffic lights PW 2 ordered the driver of

the vehicle to go back to where the two officers first saw him, at which place the driver cautioned and then charged by PW 3 Sub-inspector X. (Tape no. 16 1999)

Through this type of storytelling the facts of the case stage of the judgement genre is achieved and the story-in-the-trial gives way to another story-type, that is, the story-of-the trial in which the magistrate now highlights the evidence and the way it was given by different characters in the story. The story-of-the –trial allows the magistrate to give his opinion and argument on the credibility of the stories-in-the trial, assessing the completeness and consistency of the events as narrated by different witnesses. At this stage also the magistrate must respond to the submissions made by counsel in their closing speeches and in the various objections sustained through out the course of the trial. The following excerpts demonstrate the use of narrative for argumentation by the magistrates.

Excerpt 3

1. Magistrate: At the close of the case after his rights and options were clearly and carefully explained to the accused person they elected to have it closed and called no other witnesses. **(2).** With regard to count one the accused person said that when he entered Lobatse road the lights were green **(3).** With regard to count two the accused person said he did in fact see PW1 but unfortunately there was no way he could stop as he was on a highway and it was no stopping zone. **(4).** Now of the three prosecution witnesses, PW1 Sergeant X who testified the accused vehicle lights... when he was asked how he was able to say that the accused drove against the lights he said he was on the line of vision of the traffic lights along Lobatse road and that those lights were green and that he took it that those regulating the traffic must have been red, in other words he deduced from the colour of the lights along Old Lobatse Road that the colour of the lamps regulating the... must be red. **(5).** However I must say that the traffic authorities in Botswana and other jurisdictions that one is not (inaudible) He says that, and I quote, if the

(inaudible) in which the accused did not intend to stop at a traffic light the cop is not entitled to assume that when the colour of the lights of the robot facing one direction is green, the light indication of the robot at right angle to the to the former is red.(6). For authority of this point in this jurisdiction one would be advised to look at the case of X. of the Botswana Law Report 1988 at page a hundred and two. (7) It is therefore clear that the prosecution cannot (inaudible) (Tape no. 16 1999).

The magistrate then goes into the story-of-the trial of the second count. And makes a ruling for the counts:

Excerpt 4

In conclusion and out of the boundaries of both, I will say that the accused is found not guilty in regard to count one and is acquitted and discharged but is found guilty on count two and is convicted thereof. (Tape no. 16 1999)

An Analysis of the above narrative soon reveals that evaluation of the stories told is the most significant part of judgement narratives. The story has its Abstract (Labov 1972) or Orientation (Harris2001), summarising or giving the circumstance surrounding the narrative account, thus the magistrate begins his story as quoted above with the words:

At the close of the case, after his right and options were clearly and carefully explained to the accused person they elected to have it closed and called no other witnesses.

He then goes into the core narrative which represents the story of the trial as it unfolded with its various characters, being witnesses. When in clause(5) the magistrate begins his clause with 'However' he is introducing the 'Evaluation' part of the narrative commenting on various aspects of the story such as the characters' interpretations of the events they were involved in. He uses this evaluation to argue that the event (here that of passing when the

traffic light was supposedly red), was not wrongful as the witness cannot be sure that the light was in fact red. The magistrate then tells the 'Point' (Harris 2001). The point of the story is to make a judgement of the case which in this trial is finding the defendant not guilty in regard to count one and guilty on count two.

The functions of the story-in-the-trial and the story-of-the-trial are then to inform and remind the audience for the first, and both to inform and to argue his points and convince the audience of the reasonableness of his judgements for the second.

The other judgement text proceeds on basically the same line of telling the story and reasoning it out with the audience. But it also contains another point worthy of discussion, that is, the idea of persuasion occurring at many points in the trial and building up the points won and banking them for both the submissions stage and the judgement stage. The following text contains this element of the trial being made up of little separate arguments and points of persuasion won and lost by both sides of the case.

Excerpt 5

Magistrate: The certificate of calibration was rejected by this court on the basis that it was hearsay. However, in the case of X (quotes precedent) I do not see how it cannot be hearsay. On the other hand I do not believe the statement by defense counsel that the machine (inaudible) to be hearsay. I believe that the witness had firsthand information and can testify. The same applies, I believe to the question of whether the machine could have been working well...anybody who has some knowledge accumulated over a period of weeks of using the machine can tell whether it is in working order. The officer therefore acquired the expertise... Therefore there is an element of doubt as to whether there was... the second test is a reliable one. I

therefore find that the state has failed to state the case beyond reasonable doubt. Therefore the accused is acquitted and discharged.

This judgement uses as a basis for its argument, various points made in other stages of the trial, for example the reference to a successful submission during examination-in-chief made by defense counsel against production of the certificate of calibration by prosecution. Defense counsel argued that the certificate was not first hand information, that is, it was hearsay. In his argument, the magistrate upholds the defense counsel's submission. But he rejects another submission made by the same counsel for the defense about the witness's competence in operating the alcometer. In the first point of argument the magistrate uses a precedent case to support his argument. In the second and third points where he rejects defense counsel's submission he appeals to commonsense logic.

The fact that a trial contains a number of series of arguments and attempts at persuasion of the audience, primarily the magistrate in this study, is very clearly attested to by teachers of trial tactics themselves. The University of Botswana lecturer I interviewed on the place of persuasion in the trial had this to say:

Excerpt 6

Respondent: Yah, in fact a case can have numerous rulings. Like for example, there are small rules relating to how to ask a question. Like if I call you as my witness you can" ehbm, I can't tell you an answer if I am your lawyer. When I ask a question and I say, 'Did you go to Mogoditshane?' I have to ask you 'Where did you go?' So immediately when you say, 'Did

you go to Mogoditshane?’ I stand up as a lawyer for the other side before the answer comes in and say ‘Objection!’ The court will ask me ‘Why are you objecting?’ I persuade him that no, ‘I’m objecting because this is a leading question. It is going to tell the witness the answer and the lawyer is now giving evidence himself!’ That is also an argument. So if I win that argument he’ll make the ruling that ‘Objection sustained!’ There’s lots and lots of arguments throughout the trial in between. (Validation Interview 2001)

This serves to re-emphasise the centrality of the art of persuasion in the trial at all its substantive stages - the examinations stage and the closing arguments and judgements stages.

6.6.1 The language of the judgement

I have, previously discussed the generic structure of the judgement as a courtroom genre. I wish here then to examine the language of the judgement rather than its textual structure. The judgement, as well as being a genre, is also a register. It can be described in terms of field, tenor and mode. We know by now that the field of the judgement as a text is the legal processes of adjudication and conflict resolution in a formal setting. The field contributes to the courtroom language the particular characteristics of legal language. As far as tenor is concerned, Maley (1994 p. 44), points out that, individual styles vary considerably in judgements, but that, ‘because of the social gravity of the occasion or speech event, a consistently lofty and formal tenor is typical.’ The mode of the judgement is initially, a text written to be presented orally and is usually delivered in the first person mode. The basic grammar of the judgement is the past tense wherein the judge tells the stories both of the trial and the events of the charge against the defendant. It is also

reported speech and includes quotations of previous judges arguments and rulings.

Another very discursively prominent feature of judge's language is in the move toward sentencing. Here the interactants are the judge and the defendant. It is an exchange initiated and concluded by the judge. This is found mostly in cases of short duration and comes after the reading of facts when the judges asks the defendant whether he or she has understood what has been said concerning him before pronouncing the judgement.

Excerpt 7.

Magistrate: Have you understood what has been said?

Defendant: Yes.

Magistrate: Is it correct that you were given up to the fourth of this month to remain in the country?

Defendant: Yes.

Magistrate: And is it correct that you nevertheless decided to stay in the country until the 27th when you were arrested?

Defendant: Yes Your Worship.

Magistrate: All right. You will be convicted on the charge according to your plea. Now, his record?

Prosecutor: No previous record Your Worship.

Magistrate: Before the court sentences you, do you have anything to say?

Defendant: I didn't know that if I remain in the country I would be charged.

Magistrate: The maximum penalty for the offence of over-staying in Botswana is Ten Pula for each day you over-stay. So you will pay Five Pula for each day over-stayed and my calculation is Forty Pula fine to pay today or a month in prison. (Tape no. 15 1999)

This exchange is typical of short cases. It also exemplifies a point often made in studies of power, that is, the judicial discretion. This judge on this day fined several offenders against the immigration laws of Botswana and consistently fined them less than the maximum charge, showing basically the

clemency of the judge when handling case whose duration is short and therefore discursively uncomplicated. The discourse is intriguingly simple made of question and answer routines that do not involve the power stances often criticised as coercive and degrading in the literature of courtroom questioning. The question 'Is it true?' although it requires a Yes or No answer does not have the tinges of aggression which similar questions by opposing counsel often displays.

6.7 Conclusion

The literature on speeches in the courtroom generally separates the discussion of counsel opening and closing speeches from judgements. Opening and closing speeches have received some attention as in Goldberg (1985) and judgement genres have been treated to discussion by Maley (1994). The narrative theory of the trial has received a great deal of attention from both sociologists and semioticians (Bennett and Fieldman and Jackson) as well as from lawyers themselves as in Brooks and Gerwitz (1996) This study has been greatly enhanced by Brooks and Gerwitz establishing the link between narrative and rhetoric, the art of persuasion, in the law. The putting together of the discussion of all courtroom speeches and narrative in an attempt to explicate how they are related to the art of persuasion was an initial intuition on my part but has found good support in the literature.

CHAPTER 7 SUBSTANTIVE PROCESSES 2: The dialogues of Examinations.

We pointed out at the beginning of the discussion of the substantive courtroom processes that they are distinguishable into monologues and dialogues and that the dialogues would be analysed by a different model from the narrative and genre analysis models used on the other processes. This is the model of discourse analysis first developed in what is now called the Birmingham model. This model is chosen for its productivity in revealing issues of social significance with which this thesis is concerned. These are in particular the tenor of examinations viz. the social relationships obtaining between legal professional members and the layman defendants and witnesses. The two types of exchange structures observed in direct and cross-examinations are the tools by which these issues are revealed. I shall therefore proceed to analyse the examinations with reference to the model chosen.

7.1 The model

The analytical model adopted for analysis of the examinations genre of this study is Sinclair and Coulthard's (1975) model of discourse analysis.

Malcolm Coulthard and John Sinclair first developed what was to become the Birmingham school of discourse analysis in 1975. They say that they decided to use rank scale for their descriptive model because of its flexibility and that 'the major advantage of describing new data using a rank scale is

that no rank has any more importance than any other and thus if, as we did, one discovers new patterns, it is a fairly simple process to create a new rank to handle it' (Sinclair and Coulthard 1975:20). They warn us here, though, of 'the ever present temptation of creating new ranks to cope with every little problem.' This advantage has been utilised by researchers subsequent to Sinclair and Coulthard. For example Harris (1980) added a new rank to the scale, which she called 'sequence,' and Berry (in Coulthard and Montgomery 1981:124) concurs that 'we need an approach which will allow us to account for newly observed patterns of organisation in discourse alongside those which have already been accounted for.'

What is this rank scale and how does it operate? 'The assumption of a rank scale is that a unit of a given rank, for example *a word*, is made up of one or more units of the rank before it, the *morpheme* and combines with one or more units at the same rank to make a unit at the rank above, *group*. (Sinclair and Coulthard 1975 p.20 cite Halliday 1961 *Categories of the theory of Grammar* for the concept of rank scale) Discourse is seen to be made up of a hierarchy of elements the highest of which is the Transaction and the lowest the Act. In between these elements are, starting from the bottom, the Move and the Exchange. The relationships of this hierarchy of elements is illustrated in the following diagram:

Diagram 1 The rank scale of discourse elements

← Transaction →

← Exchange →

← Move →



7.1.1 The Transaction

According to Sinclair and Coulthard (1975 p.25) The Transaction as a level of discourse is made up of three elements being the Preliminary move (P), the medial moves (M) and the terminal move, (T). The structure of the transaction is PM (M2...M2) (T) where everything in brackets is optional (Sinclair and Coulthard 1975:25). I find Sinclair and Coulthard's description of this model of discourse a little problematic in that terms like exchange and move are sometimes used interchangeably, for example, after clearly describing the ranks from act, move, exchange and transaction we get a statement like, there must be a preliminary move in each transaction and a medial move and terminal move and immediately after this assertion Sinclair and Coulthard state that. 'The preliminary and terminal *exchange*, it is claimed, are selected from a class of moves called '*Boundary*' moves. Use of terms in this way causes considerable problems for someone trying to distinguish between the ranks for analysing a particular discourse. However, several researchers, including Harris (1980), Coulthard and Montgomery (1981) Deidre Burton (1981) and Robert Mead (1985), have applied this model to various discourses (courtroom discourse by Harris and Mead, spoken discourse by Burton, doctor/patient, committee meetings and broadcast discussions by Coulthard and Montgomery) without being held back by this apparent contradiction in terms and variously developed the model to account for the characteristics of their particular types of discourse

and their data. I shall not venture into discussion of all the modifications of the Sinclair/Coulthard model such as Berry (1981)'s information exchange model involving the flow of information from primary to secondary knower, otherwise termed the K1 model set out in Coulthard and Montgomery (1981) and several more recent models which have added a sophistication (mainly in terms of delicacy) to the original model for application to various contexts. This is basically for the reason that courtroom discourse, especially in the examinations genre, is much less complex and can be adequately described with little modification to the original models such as the addition of the rank of sequence (Harris 1980) and the redefinition of the follow-up move Coulthard and Montgomery (1981).

The usefulness of the construct, 'transaction' in describing courtroom discourse has been shown by Harris (1980) in her observation of one particular type of court, the Areas and Maintenance Court. She outlines the transactions to be found in the discourse as the Preliminary Transaction, the Information gathering Transaction, the Ordering Transaction and the Closing Transaction. (p.63). In the courtroom of this study, which is a criminal court, there are seven Transactions. These are (1) the Mentions Transaction, which is concerned with making preparations for the trial like setting dates of trial; (2) the The Reading of Charge Sheet Transaction, in which the charge sheet is read to the defendant; (3) the Direct Examinations Transactions; (4) the Cross-Examinations Transactions; (5) the Submissions Transactions; (6) the Reading of Facts Transaction and (7) the Judgement or Ruling Transaction.

These transactions have been discussed in Chapter 4 describing the courtroom processes.

The Direct Examination Transactions which, along with Cross Examinations, are the subject of this chapter, begin with the preliminary exchange which is realised by the swearing in of the witness beginning with the question put to the witness by the court clerk, 'Do you believe in God?' Whereupon if the witness answers 'Yes' he/she is directed by the court clerk to put his/her left hand on the bible and lift up his/her right hand with his/her palm facing outward and say the words after the clerk, 'I so and so, do hereby swear that I will tell the truth, the whole truth and nothing else but the truth so help me God.'

The Initiations and Responses (concept to be discussed later in this chapter at the section discussing exchange structure) of this Preliminary exchange give way to a series of medial exchanges aimed at eliciting information regarding the series of events leading to the charge being levelled at the accused person. For the purpose of dividing the discourse into acts, moves and exchanges, I will proceed now to define these levels of discourse structure and show how they relate to the examinations transactions in this courtroom's data.

7.1.2 Acts.

The act is the bottommost level of discourse structure. Their definition is not quite clear from Sinclair and Coulthard (1975) as they go directly from mentioning them to listing them. They recognize, in teacher pupil interaction, twenty-two acts, which space does not allow to be listed here, but I shall mention only those which appear in courtroom discourse without any particular order. These are *markers*, which Sinclair and Coulthard suggest are realised by a close system of items like 'well,' 'ok' 'now,' 'good,' 'right,' and 'alright.' The type of marker used by prosecutors examining witnesses in the present data are in fact realised by 'Yes,' made at the head of each of the prosecutor's eliciting moves.

Excerpt 1. Tape no.8 Case no.23 15-08-99.

Prosecutor: Do you know the accused?

Interpreter: Gatwe a o itse mosekisiwa.

Witness: Erra kea mo itse.

(Yes, sir, I know him.)

Prosecutor: Yes, can you tell this honourable court how you came to know the accused?

Excerpt 2 Tape no.8 case no.23 15-08-99.

Prosecutor: Where did you say the accident happened?

Witness: Gone mo Broadhurst ha o hapaanya strata se se tswelang ko...

(Here in Broadhurst when you come to cross the street which goes out to...

Prosecutor: Could you tell this court what happened?

Witness: Nna erile hela ke ke tsamay mo strighting hela ha ke labile go ema ke bone koloi engwe e tshweu e tswa ko pele game mme e ebe e tswa

motong ga tsela. Ha e tswphantse ke go hapaana le yone mo lebogong laaka

(Me while I was driving along the street just about to stop I saw a white car coming from the opposite direction and then it got out of the When I was just about to cross keeping to my side of the road...

Prosecutor: Yes to which direction was this motor vehicle which collided with you?

Witness: E ne e tswa ko... (inaudible)

(It was coming from... (inaudible)

Prosecutor: Yes Can you describe the particulars of the motor vehicle... (inaudible)

Witness: (inaudible)

Prosecutor: Did you get the chance to see the registration number?

Witness: Ga ke ise ke nne le chance ya go leba registration numbers ka ke ne ke shokegile.

(I did not get the chance to look at the registration numbers because I was shocked.)

Prosecutor: Yes were you alone?

It may be argued that the 'yes' prefacing each question is a feed back or follow up move (F), but it is generally the case that in the IRF structure of exchange, the Feed back relates to what has been said in the previous response e.g.

I. Can you think of anything that would be put on. Would they just bewritten or painted on the sand?

R. They might be on the rocks.

F. Yes they were mainly carved on rocks.

(Sinclair and Coulthard 1975 p.71)

We can see in this example that 'Yes' is a feedback move indicating that what was said in the Response by the pupil was a correct answer. The prosecutors 'Yes' in the excerpts just given above does not seem to link to the previous response in any noticeable way. I therefore consider it to be an Act, a marker of the beginning of each exchange. This is testable by reference to the intonation of the Feedback move in Sinclair and Coulthard,s example and the intonation in the 'Yes' of this data. The prosecutor's 'Yes' has a low tone while the teacher's will probably have a level tone.

Another act observed by Sinclair and Coulthard in teacher/pupil interaction is the *elicitation* (el) realised by questions functioning to request a linguistic response. This is the most prominent act in the moves of the examination transaction. The whole of the transaction of any length in the examination transaction is a series of elicitation acts, from the beginning to end of the medial exchanges.

The *informative* (i) act in the courtroom is found in several of the courtroom transaction, namely, submissions, readings of facts of the case before judgement and the judgement itself. But unlike the informative act in the teaching transaction, which Sinclair and Coulthard describe as ‘realised by statements whose sole aim is to provide information and which only requires an acknowledgement of attention and understanding from the pupil (Sinclair and Coulthard 1975 p.40), the courtroom informative act is much more just passing on information. It is a complex and multifunctional act, for example in rulings and submissions this act is used to also to persuade, by reasoning, either the magistrate, in the case of a submission or the defendant and his counsel in the case of a judgement. The *acknowledging* act comes into play when the defendants have to acknowledge their names and other particulars as they appear in the charge sheet and facts read at the penultimate transaction of criminal court. Defendants are sometimes required to *reply* to questions put to them by the magistrate like ‘Do you understand?’ after the charges have been read to them, realised by ‘yes’ or ‘no,’ or reply to the question ‘do you plead guilty or not guilty?’ which, in Setswana the language of which most charge sheets are read to the defendant, is responded to by ‘I

find myself guilty' (Ga ke ipone molato) or 'I do not find myself guilty.' I quote the plea made in Setswana because it may sound like a stronger, self-incriminating in English whereas in Setswana it is just a way of showing humility before the law.

These are the acts most characteristically found in the criminal court discourse that is the subject of this study.

Acts	Sinclair and Coulthard Realisation	Realisations in the present courtroom data	Examples
Markers	Realised by a closed class of items – 'well,' 'OK,' 'now,' 'good,' 'right,' 'alright.' Their function is to mark boundaries in discourse.	S/C closed class needs to be opened up to include a new marker discovered in this data and that is, 'Yes.'	Magistrate: All right, I'll take you in my confidence and grant you bail for one thousand Pula. Prosecutor: Yes. To what direction was the motor vehicle which collided with you? Prosecutor: Yes can you describe the particulars of the motor vehicle?
Elicitation	Realised by questions. Its function is to request a linguistic response.	In this data also by commands.	Prosecutor: Do you know the accused person? Pros: Go on and tell us. Magistrate: Tell us the story.
Directive	Realised by commands. Its function is to request a non-linguistic response.	Same as Sinclair and Coulthard	Clerk: Stand up accused. Clerk: go to the witness stand.
Informative	Realised by statements. Its sole function is to provide information. The	Informative needs broader definition for courtroom discourse to include suatives	Counsel: Your Worship ehm the case my leaned colleague the prosecutor refers to

	only response is an acknowledgement.	i.e. reasoning whose aim is to persuade.	is one in which there was clearly abuse of process... It is pertinent to note that... However, Your Worship there are vital elements...
Reply	Realised by statements and questions and non-verbal surrogates such as nods. Must give a response that is appropriate to the elicitation.	Same but perhaps not nods in this highly verbal context.	Magistrate: Do you understand what has been said? Defendant: Yes. Magistrate: Do you have anything to say accused? Accused: Ke gore ke ne ke batlile charge sheet yaaka. Mapodisi ba ganne ka yone. (Its just that I had asked for my charge sheet but the police refused with it.

Table 9 Acts in courtroom discourse

7.1.3 Moves

The next level up from act in the discourse hierarchy is the level of moves, ‘which are made up of acts and occupy places in the structure of exchanges.’

Sinclair and Coulthard recognise five classes of move as *framing* and *focusing*, which realise Boundary exchanges; and *opening answering* and *follow up* moves. The function of an opening move is to cause others to participate in an exchange by for example ‘passing on information, directing action or eliciting a fact,’ (Sinclair and Coulthard 1975 p. 45). Answering moves are ‘predetermined’ because their function is to be appropriate responses in the terms laid down by the opening moves.’ As prosecutors and

counsel have the onus of opening the examination and asking questions, they are placed in positions of power over witnesses in the process of information gathering. The fact of their access to opening moves gives them power to control topics in the discourse and the onus to ask questions goes further to reinforce this power as, in natural language, a question demands an answer and so by extension the prosecutor and counsel are given the right to demand answers to their questions. Counsel are made even more powerful as it is their ‘right’ to pose questions that impeach the evidence already adduced by prosecutors. This is the distribution of power in the courtroom, which is most negatively criticised by researchers of language in legal settings. The moves of the prosecutors in direct examinations, however show that this criticism may is unbalanced as it relates to only one type of questioning in the courtroom. The following table sets out the co-operative moves of the direct examination.

Moves	Acts	Examples
Initiation/Opening	Elicitation	Prosecutor: Do you know the accused person?
Response/Answering	Reply	Defendant: Yes I know the accused person.
Initiation /Opening	Elicitation	Prosecutor: Will you please tell this honourable court how you came to know the accused person?
Response/Answering	Reply	I came to know the accused person I met him along Machel Road he was driving past the robots. On the 14 th of November 1998 I was on patrol in a police vehicle driven by Constable Tsholo. It happened that while we were along the road there was a Toyota

Initiation Response/Answering Initiation Response	Elicitation Reply Directive Continuation	Corolla in front of us... Prosecutor: At what time? It was around 01.15 Hours Prosecutor: Go on. Witness: and when he came to the show ground his Toyota Corolla turned to the right etc.
--	---	---

Table 10 Moves in the direct examination

7.1.4 The exchange

Michael Stubbs (1983 p.104) defines the exchange as ‘ the minimal interaction unit comprising at least an initiation (I) from one participant and a response (R) from another.’ He goes on to describe the structure of the exchange by positing that the ‘simplest structure for an exchange is IR and the most obvious example of such exchange is the question and answer pair.’ He goes on to elaborate (p.109) that exchange comprises an initiation where the possibilities are open- ended followed by utterances (moves), which are preclassified and therefore restricted. If the possibilities are opened up again this marks a new exchange or at least a bound exchange. Or, alternatively the exchange can be regarded as an information unit the propositional frame of which is defined by the initiation. Any utterances which function to complete the proposition... form part of the same exchange,’ thus the ‘syntactic’ and ‘semantic’ definitions of exchange. Stubbs also points out that ‘It is possible for a proposition to be distributed across several turns,’ for example

A: I am going to London

B: When?

A Tomorrow

B: By train?

A: Yes.

(p.110)

These definitions and the exemplification are good guides to dividing up the direct examinations into their component exchanges and I will now proceed to do so.

The Direct Examination transaction in the data from this courtroom is preponderantly made up of series of Initiations and Responses with no occurrence of the feedback or follows up moves at all. This is a particularly interesting structure and has been commented on by researchers who have made use of the Sinclair Coulthard model of analysis of discourse such as Margaret Berry and Deirdre Burton who refer to each other's work in Coulthard and Montgomery (1981). Berry (1981 p.123) observes that Burton (1978 p.139) 'dispenses with feedback altogether on the grounds that it hardly ever occurs outside the classroom,' and says that Burton is 'surely wrong about this, and that her own observations suggest that 'optional feedback occurs very frequently in non-classroom forms of discourse,' and 'obligatory feedback occurs more often than one might at first think – not only in such obviously likely forms of discourse as radio and television quiz programmes but also in adult leisure conversation.' She cites 'family crossword solving sessions; parties – informal dinner parties as well as more organised occasions often seem to include puzzle-solving sessions.' Berry (in Coulthard and Montgomery 1981 p. 123). Berry also notes the way Coulthard and Brazil (1979) handled this problematic move, which they 'preferred (later) to call follow-up', and the way Stubbs (in Coulthard and

Montgomery 1981) attempts to ‘distinguish between a structure with three obligatory elements and a structure with two obligatory elements.’ However Berry also points out that Stubbs provides no ‘way of specifying the circumstances under which each would occur.’ This brings me to my point that there does definitely seem to be two types of exchange structure when we recognise that both Sinclair and Coulthard and Margaret Berry recognise the existence of the feedback move in their various data and Burton dispenses with it in her data. Mine is the data that does not include the feedback move at all as I shall presently demonstrate. The direct examination transaction of the criminal court trial is consistently made up of two moves; the Initiation and the Response bundled around a level of structure, which seems to be above the exchange rank level. The following excerpts from the data demonstrate these two points, the IR nature of the direct examination and the level of structure between the Exchange and the Transaction.

The third move in exchange structure, i.e. the Feedback move need not be definitive of exchange. For instance, Stubbs (1983) says of the Exchange that ‘...I will define an exchange as the minimal interactive unit, comprising at least an initiation (I) from one speaker and a response (R) from another. The simplest structure for an exchange is therefore IR’ and ‘The most obvious of example of such an exchange is probably the question and answer pair, with the structure QA.’ This definition is adequately demonstrated by the direct examinations data from this courtroom. The structure of the direct examination exchange then is IR and the whole examination transaction is made up Sequences of IR. The following excerpts exemplify this point.

Excerpt one.**Tape Number three. Case number 18**

1. Prosecutor: Do you know the accused person?
2. Witness: I know the accused person.
3. Prosecutor: How do you know the accused person?
4. Witness: (inaudible)

Excerpt 2 (from the same source)

1. Prosecutor: Do you know the accused person?
2. Witness: Yes, I know the accused person.
3. Prosecutor: Will you please tell this honourable court how you came to know the accused person?
4. Witness: I came to know the accused person I met him along Machel road he was driving past the robots. On the 14th of November 1998 I was on patrol in a police vehicle, which was driven by Constable Tsholo. It happened that while we along the road there was a Toyota Corolla in front of us
5. Prosecutor: At what time?
6. Witness: It was around 01.15 hours.
7. Prosecutor: Go On.

Excerpt 3**Tape Number 9 Case Number 23**

1. Prosecutor: Do you know the accused person?
2. Witness: I know the accused person.
3. Prosecutor: Yes can you tell this honourable court how you came to know the accused person?
4. Witness: I came to know the accused person on the 15th of March at about 9.15 pm when he was involved in a car accident.
5. Prosecutor: Where was this accident.
6. Witness: The accident was along Segoditshane Way near the traffic circle.
7. Prosecutor: Yes can you tell this court the number of vehicles involved in the accident?
8. Witness: Yes there were two vehicles.
9. Prosecutor: Can you tell the court how the accident happened?
10. Witness: According to the statements I took, the driver of B786ACI was driving south and the accused was driving north. The lady says the accused got out of his lane and knocked his car.
1. Prosecutor: Did you find both drivers at the scene of the accident?
2. Witness: Yes I found both drivers at the scene of the accident.
3. Prosecutor: And what happened?
4. Witness: On arrival at the scene... (Continues with the response)

Excerpt 4**Tape Number 9 Case Number 24**

1. Prosecutor: Do you know the accused person?
2. Witness: Yes.
3. Prosecutor: Tell this court how you came to know the accused person.
4. Witness: I came to know the accused person in June 1999 when we were on patrol on Nelson Mandela Road.
5. Prosecutor: What time was it?
6. Witness: It was around 11.50 pm.
1. Prosecutor: Yes what attracted you to the accused's vehicle?

2.Witness: We were proceeding in the same direction his vehicle was going in a zigzag manner...(witness proceeds with a narrative and description of the events that lead to the charges being levelled at the accused person.)

Excerpt5

Supplementary data tape Number 2 Case Number 3.

1.Prosecutor: Yes Do you know the accused person?

2.Witness: Yes my Lord.

3.Prosecutor: Yes Can you tell this honourable court how you came to know the accused person?

4.Witness: Yes Your Worship. On the 24th day of September 1999...(witness proceeds with narrative of the events leading to the charges being levelled at the accused.)

The preceding excerpts have been lined up to indicate the regularity with which the IR is used in the direct examinations data. They also demonstrate the absence of the Feedback move in this type of examination thus illustrating Stubbs' assertion that there are both three slot structures and two slot structures and that the exchange is defined by at least two obligatory element slots.

It has been argued in this chapter, under the discussion of Acts, that the 'Yes' preceding the prosecutors' questions is a marker, that is an Act, rather than a move – Feedback. The other point demonstrated by this data is the existence of a level higher in the hierarchy of discourse than the Exchange. This the element is demonstrated independently by this data, but it is not itself a new discovery as it has been recognised and argued for by Harris (1980 p.74).

She says, upon discovery of this level, that '...it was felt necessary to introduce a rank between Exchanges and Transactions which would be clearly definable by discourse alone, especially as the information Gathering Transaction in every instance can be broken down into smaller units which are larger than Exchanges.' She labels these units 'Sequences' and is then

left with the problem of ‘ordering these smaller units.’ About which she suggests that ‘there seem to be two possibilities here: either to bring in the notion of topic carrying Exchanges with the Sequence being maintained until a further topic is introduced; or to define on more formal grounds the build up of similar types of Exchange types which is such an obvious feature of interaction in magistrates’ courts.’ I find no problem with the semantic definition of Sequence as a series of topic carrying exchanges, in line with Stubbs (1983).

The part of the direct examination from which these excerpts are taken is the first of the medial exchanges introduced when we first introduced the Sinclair Coulthard model of discourse analysis, the preliminary exchange in this courtroom discourse being the swearing in of witnesses. The beginning of the exchange typically comprises four turns – IRIR – with the prosecutor restricting the first R with a Yes/No question – ‘Do you know the accused?’ He then asks the first open-ended question ‘How did you come to know the accused person’ or ‘Could you please tell this honourable court how you came to know the accused,’ which is responded to with texts of various length being either fragmented testimony or narrative testimony. The following table sets out the level of structure termed sequence by Harris (1980) as it is found in the direct examination of this data.

Sequence	Realisation	Example text
Initiation	Question Yes/No Closed	Do you know the accused?
Response	Answer	Yes. I know the accused.
Initiation	Question: Wh Open	Can you tell this court how you came to know the accused Person?
Response	Answer: Narration	I came to know the accused person when I met him along Machel Road. He was driving past the robots.

Table 11 Sequence in Direct Examinations

7.1.4 Types of exchanges

Sinclair and Coulthard (1975 p.49) recognise, in their classroom interaction two major classes of exchange – *Boundary* and *Teaching exchanges*. The boundary exchange functions to ‘signal the beginning or end of what the teacher believes to be a stage in the lesson. It comprises two moves the framing and focusing moves. Teaching exchanges are the individual steps by which the lesson progresses. The teaching exchange is then observed to have eleven subcategories, six of which are *free* exchanges and five *Bound* exchanges. Of the bound exchanges, four are bound to the teacher elicits and one to the teacher inform exchanges.

There are four main functions of free exchanges. These are informing, directing, eliciting and checking. The function of the transaction under analysis, that is, the direct examination is that of information gathering. It is therefore, typically realised by the Eliciting Exchanges and, just like in the teaching transaction, the prosecutor uses series of Eliciting Exchanges to move the witness step by step to a conclusion of the transaction. (Sinclair and Coulthard 1975p. 51).

When a teacher gets no response to an elicitation, he can start again using the same or rephrase of the question or use one or more of the acts-prompt, nomination, clue-to re-initiate. (Sinclair and Coulthard p.53). Re-initiation is a very distinctive move in examination, although it is for different reasons in direct than in cross –examination. In direct examination Re-initiation is used in a friendly manner to build up confidence in the witness and to tell the ‘story’ in support of the accuser. In cross- examination the re-initiation is often used in an unfriendly and coercive manner to try to force an admission of either unreliability of the direct examination testimony or to endorse counsel’s own viewpoint. For example

Excerpt 1 Case no. 2 of supplementary data

Defense Counsel: I am going to ask you a few questions so that what you have said to the court is the truth as far as you know. Now, you said Thabang was knocked at the zebra crossing did you say it?

Wit: I don’t understand the question.

Defense Counsel: Was he knocked at the zebra crossing or not?

Interpreter: A o utwile sentle? A o ne a le fa zebra crossing.

Witness: O ne al (inaudible)

(He was...

Defense Counsel: Was Thabang knocked at the zebra crossing or not?

Witness: Silence

Defense Counsel: Yes or No was he knocked at the zebra crossing or was he not knocked at the zebra crossing?

Witness: I didn't see.

Defense Counsel: So when the car knocked him he was at the zebra crossing. So if somebody could come and give evidence which says that Thabang was not knocked at the zebra crossing but away from the zebra crossing that information would be incorrect?

Here we see that counsel has deliberately asked a question which would be difficult for the defendant to answer and insisted on an answer so that he can make his point of casting doubt on the witnessed testimony given under direct examination. However we will for the present continue with discussion of the direct examination.

The Eliciting Exchanges that follow the first sequence of IR Exchanges (Which we may label Opening Exchanges), then are Exchanges aimed at eliciting the details of the events leading to the charge like the time, place and people involved in the event of the accidents or other traffic offences.

The questions immediately following the final R of the Opening Exchanges seem to be in the nature of filling the gaps of information left by this R. For example

Witness: About half past one I was patrolling [

Prosecutor: [Were you alone?

Or

Witness: It happened that eh while we were along this road, there was a Toyota Corolla in front of us.

Prosecutor: At what time?

Or

Witness: On the third day of October 1998 a road traffic accident was reported to me by (inaudible) along the Tlokweng /Zeerust road.

Prosecutor: What time was the accident reported to you?

And

Witness: I came to know the accused in June 1999 when we were on patrol on Nelson Mandela Road...

Prosecutor: What time was it?

The rest of the Transaction is made up of a series of topic Exchanges involving questions and answers aimed at drawing out necessary details of the events leading to the charges. The closing of the direct examinations transaction is signalled by a pre-closing final IR exchange. This usually states the final action taken by the police who were called to attend the scene of the accident in traffic offences. It is made up of the final QA pair.

I. Prosecutor: After you served the accused with the print out what did you then do?

R. Witness: I warned and cautioned him of the charges of driving whilst unfit due to drinks.

Or

I. Prosecutor: Was he warned of any charge?

R. Witness: He was warned of the charge of driving whilst unfit due to the influence of alcohol.

The prosecutor then announces to the magistrate that ‘that is all, Your Worship,’ or thanks the magistrate- ‘thank you Your Worship.’ Recording errors made by me involved switching off the recorder before the next witness was called in. For this reason it is difficult to say what actually was said to call the next witness in the same cases. But after the next witness is called in, the next direct examination begins with the Preliminary Exchange of swearing in and follows exactly the process just described i.e. the sequence of IRIR and then the medial exchanges aimed at eliciting the story of the prosecution

7.2 Routine in daily work situations

Examination of the question and answer exchanges of Direct Examinations soon reveals its routine nature. It is clear that the prosecutor knows the answers to the questions he asks, or at least he has a general expectation of

what the answers will be. A question like ‘Was he warned of any charge?’ surely presupposes that the answer will be positive. A negative answer from the witness would definitely be embarrassing for the prosecution. Take another Question, ‘Did he see the results?’ (Said in a falling tone which indicates that a compliant response is expected). A negative answer would be damaging for the prosecution.

This view that the prosecutor has a general expectation of what the answers to his questions should be is demonstrated very amply by the occurrence of one such a negative response to his question. The prosecutor, as usual at this juncture, asked his question –

Prosecutor: Do you know the accused person?

Witness: Nnyaa Rra ga ke mo itse. (No sir, I don’t know him)

Chaos ensued; showing clearly that the answer was an unexpected, ‘dispreffered’ second part to the ‘adjacency pair.’ All the court participants immediately and rapidly take steps to ‘repair’ the discourse disruption created by the unexpected answer. Instead of the ‘turn’ going back to the prosecutor who normally and routinely would ask the second IR of the first sequence of exchanges i.e. ‘Would you please tell this honourable court how you came to know the accused?’ it’s the magistrate who immediately asks, ‘Have you never seen him?’ and the interpreter quite normally interprets the magistrate’s question to the accused. ‘Ga o ise o mmone gope?’

But then instead of leaving the prosecutor and the witness interact as usual, the interpreter asks his own question, ‘Ke santlha o mmona?’ (Is it your first time to see him?)

Witness: Silence.

The witness's first answer threw the court into chaos basically because it is a 'dispreferred' second part to the adjacency pair. It is also unacceptable to the court i.e. it contravenes Grice's (1976) maxim of co-operation conduct of conversation because, although 'informative' it does not give the expected response.

Eventually the Prosecutor takes back the rightful turn and asks,

Prosecutor: Do you know why you have been brought to court?

Witness: E Rra ke a itse. (Yes, sir, I know)

Prosecutor: Can you tell this court why?

Witness: Ke tlile go fa bosupi. (I have come to give evidence)

Instead of the turn going back to the prosecutor, the magistrate again interrupts the exchange between prosecutor and witness.

Magistrate: Can you tell the story?

This is a very disrupted Direct Examination, with the formal discourse falling down to the level of ordinary, multiparty, conversation. We note that once the repair work has been done, the routine sets in again with the exchange being between the prosecutor and the witness. Unfortunately the repair work has not been very successful as the witness continues to be recalcitrant. He is inaudible and inarticulate in 'telling the story' as the magistrate has exhorted him.

The foregoing narration of the story of the failed testimony just goes to prove the dependence of successful everyday work on routine. Sharrock and

Andersen (in Button and Lee 1987 p.244) discuss this nature of everyday work and observe that 'it is precisely this routinisation that makes everyday business possible.' In the paediatric clinic of their research they describe 'two obvious features: first the consultation is composed of a number of concatenated episodes. A form is signed; the child is examined; the mother asks a few questions about possible symptoms etc. Secondly, and equally obviously, all the activities to be done are, for the doctor at least, part and parcel of just another working day.' (p.249) I am interested in the second observation here, that is the fact that professionals develop their everyday activities so that they become second nature to them. This in turn influences the types of language they use. Sharrock and Andersen also observe from their readings in Conversational Analysis that 'Two stock ideas are now almost emblematic of studies in CA. One is the idea of there being 'a detailed orderliness' to the organisation and operation of what is called "speech exchange systems," and they say that 'these systems are to be seen in the characteristic forms of talk found in ordinary conversation, judicial proceedings, classroom teaching telephone calls, therapy sessions and the like.' The idea is 'the proposal that this orderliness' is oriented to by participants in talk and that their orientation is visible in the talk itself. The claim is that the duplets, triplets and even more elaborated structures which analysts have documented are both the resource for, and the product of, the activities which the co-participants in the talk engage in.'(p.250) They also point out that Conversational Analysis has, by addressing its materials, documented the specifics of a working solution to the problem of social organisation as the outcome of the routine features of daily life.' It seems to

me, however that the more formal the occasion the more routinised its language becomes, that is there are ways of saying associated with specific occasions and courtroom examining, especially direct examination, is very highly routinised. Yet it may not seem so to participants simply because, as Sharrock and Andersen put it, 'the structures observable in the transcripts, are routinely matters of course for participants.' (Sharrock and Andersen in Button and Lee 1987 p. 48) It seems that often the more formal a situation is, the more routinised and predictable it is.

Workplace routines are definitely matters of course for the professionals like doctors in their surgeries and prosecutors and magistrates in their courts. But what of the participants for whom the activities and their linguistic manifestations are new and strange? The literature abounds in the legal setting that attempt to see things from the layman's perspective. Mertz (1992) cites two studies which organize themselves around this perspective, that of O'Barr and Conley (1982) and Merry (1990). She says that both studies 'deal with the understanding and discourse of 'ordinary people.' She says of O'Barr and Conley's study that, 'The book talks about the ways in which ordinary people relate to the legal system' and the ways people who bring personal problems to the courts think about and understand the law and the way people who work in the courts deal with them.' And that Merry's case deals 'especially with the working class people.' (p. 428). These and other studies, are highly critical of institutional practices and the ways they cause 'linguistic blackout' for the layman. (O'Barr 1982, Goodrich 1984 and 1990, Harris 1981 and 1994 and Danet and Bogoch 1980 and Danet

1979). My study, however organises itself around the genres of the law i.e. usages of the court and although it does touch on power and ideology, it has less of the political agendas often seen in critical discourse analysis – CDA.

7.3 Types of testimony in the direct examinations: NARRATIVE and FRAGMENTED testimonies.

The role of narratives in the evidentiary stage of the trial has been examined by many researchers. There are at least three different views regarding the place of narrative in the trial. One is that by Bennet and Fieldman (1981) which relates the whole trial to the narrative mode including examinations, submissions and judgements. The other view is that by O'Barr (1982) who saw narrative in a narrower sense as relating to types of testimony and Harris (2001) examines narrative in the examinations with a different perspective on it from that of O'Barr (1982). She points out the limitation of O'Barr's theory as ignoring 'the sense in which all courtroom testimony is necessarily fragmented by virtue of being conducted through question and answer sequences...' (p.55). I shall first introduce O'Barr's theory and then go on to Harris's.

O'Barr (1982 p.77) observes that an important 'discourse variable' present in the speech of witnesses giving testimony is the narrative versus fragmented testimony style,' first observed by O'Barr (1982 p. 76). He asserts that 'ethnographic observation of courtroom interaction revealed considerable variation in the length of witnesses' responses to questions asked by lawyers.' Berk-Seligson (1990 p. 21) describes these more clearly -

‘Persons testifying in narrative style will answer questions in with a relatively long answer, whereas persons using fragmented style will answer in brief, non-elaborated responses.’ O’Barr (1982 p. 76) attribute these styles to lawyers own preferences and techniques. For example he says that, ‘At times it appeared that the examining lawyer wanted the witness to speak long and fully. On other occasions it seemed that brief, incisive, non-elaborative responses were desired.’ And says that ‘For convenience we refer to these two styles with the terms NARRATIVE and FRAGMENTED.’ He gives two excerpts to illustrate the difference:

Narrative Style

Q. Now calling your attention to the twenty-first of November, a Saturday, what were your working hours that day?

A. Well, I was working from, uh, 7 A.M. to 3 P.M. I arrived at the store at 6.30 and opened the store at 7.

Fragmented Style

Q. Now, calling your attention to the twenty-first of November, a Saturday, hat were your working hours that day?

A. Well, I was working from 7 to 3.

Q. Was that 7 A.M.?

A. Yes.

Q. What time did you arrive at the store?

A. 6.30.

Q. And did, uh, you open the store at 7o’clock?

A. Yes, it has to be opened by then.

O’Barr observes that in the first excerpt, ‘the witness volunteers a long answer to the question. In the second, the witness is less responsive, making it necessary for the lawyer to pose additional questions to elicit the same information volunteered in the first answer.’

It is by reason of this evidence that I propose to attribute the styles of testimonies as much to the responsiveness of the witness as to the purposes of the lawyer. Here, as in the data I shall present, there are two types of

answers given to the same initial question, 'What were your working hours?' but O'Barr posits a theory of these styles as lawyer-controlled. The excerpts tendered in illustration certainly do not support this theory. His theory as based on the assumption that 'since courtroom examination is organised so that lawyers ask the questions and witnesses answer them, ultimate control of these exchanges is vested in the lawyer.' Granted the lawyer's position is a powerful one in which he can control the content of the testimony but I do not believe that he has major control on the style of testimony, he must elicit the information he wants only in the way the witness responds. O'Barr himself admits this when he says that 'It appeared, in observations of the court, that long narrative answers by witnesses is possible only when the lawyers relinquish some control, allowing more leeway to witnesses in answering questions.' But he also makes the qualification that, 'When such opportunity is 'offered,' it is by no means always accepted.' I believe it important to note the force of this qualification as it does mean that the lawyer is not, ultimately, as powerful as he is made out to be. I mean by this that the witness has some power to resist the lawyer's coercive tendencies. He can be as unresponsive as he can before it is, possibly, labelled 'contempt of court,' as indeed O'Barr strongly suggests this when he says that 'it seems virtually impossible to be assumed, (the resistance) without open conflict except when the opportunity for narrative answer is offered.' To resolve this argument of the 'power' of lawyer we need to recognise that lawyers play different roles in examinations. If they are performing the direct examination they are much less likely to assume a powerful stance with the witness than if they are doing cross-examinations.

Some examples from my data show how these testimony styles come about follow.

Narrative Style

Prosecutor: Getting to Borakanelo Police Station what did you do?

Witness: When I got to Borakanelo Police Station , I went with the accused person into the testing room. I breath tested him using the Lion Intoxiliser 1400 and I issued him with the slip which was produced by the machine.
(Excerpt from case number 18)

Fragmented Style

Prosecutor: Where was Sergeant Chami taking the accused person's vehicle?

Witness: He drove to Borakanelo Police station.

Prosecutor: And what happened?

At Borakanelo Police station Sergeant Chama asked the accused person to provide a sample of breath.

Prosecutor: Were you present by then?

Witness: I was present.

Prosecutor: Then what happened?

Witness: The accused person provided the breath.

(Excerpt from case number 18. The same prosecutor examining a different witness)

The prosecutor's question 'And what happened' is asked twice. And each time it meets with a brief, single move. When the prosecutor asks the witness 'Were you present by then?' he is really asking the witness to respond with more expansively since he was present at the event. But all the responses he gets from the witness are brief non-elaborative, utilising only a single move each time.

Compare the responses in the second excerpt with the following excerpt from an examination by a different prosecutor examining a different witness.

Prosecutor: Did you find both drivers at the scene of the accident?

Witness: I found both drivers at the scene of the accident.

Prosecutor: And what happened?

Witness: On arrival to the scene, I drew a sketch plan in the presence of both drivers and after finishing drawing the sketch plan I showed it to both drivers and the driver of B786ACI told me that he agreed with what I had drawn then I told her to append her signature on the sketch plan but the accused told me that he didn't agree with the sketch plan and he refused to sign.

This narrative is helpful to the examiner in two ways. First it is difficult to think just what series of questions would be needed to elicit the details supplied, voluntarily, by the witness. Second, and discussed by some theorists of narrative genre, narrative has the power to influence and convince and therefore works in favour of the examining prosecutor or counsel. Witten (in Mumby 1993 p. 105), *Narrative and Social Control*, makes the claim that 'through narrative discourse, speakers can make strong assertions that are masked from examination and challenge.' And O'Barr speaking of narrative in judicial settings also points out that 'The general advice offered in trial practice manuals is that lawyers should allow their own witnesses some opportunity for narrative answers, and should restrict opposition witnesses to brief answers as much as possible.' (O'Barr 1982 p. 77) And says that 'This advice appears to be based on the implicit assumption that narrative answers are better received than fragmented ones. Berk-Seligson (1990 p. 22), reports that 'using this assumption as the hypothesis of an experimental study, O'Barr (1982) found that the hypothesis does in fact bear out: witnesses testifying in narrative style were rated as being more competent and socially dynamic than were witnesses who testified in fragmented style.'

The power of narratives derives from human beings predilection for the story as an art form. Everyone loves a good story and stories seem so much easier to remember than other discourse genres. Lawyers in this Botswana court are not unaware of the power of the story. This was very impressively enacted in one case, Case number three of 10-01-2000 Supplementary data.

The prosecutor just asked the usual opening series of Questions. 'Do you know the accused person?' The answer came from the police witness- 'Yes my lord,' apparently addressing his answer to the magistrate. Upon the second question of the series, 'Can you tell this honourable court how you came to know the accused person?' the witness went into a lengthy narration:

Witness: Your Worship, on the 24th day of September 1999, I had a case to attend at Gaborone West Your Worship. I had to be there at around 0830 Hours. At around 0810. I took a police vehicle and drove along Lemmenyane Drive. I was following a queue of motor vehicles from which some were joining Nelson Mandela Drive and some were joining turning right. And I was going to turn right. My vehicle was the third one from the accused's motor vehicle, which was in front. As soon as the accused's motor vehicle has passed along the bus stop, turning to the west, his motor vehicle went extremely left off the road to gravel side. It increased speed and hit a no stopping sign. His vehicle went on facing Taung BHC houses and later the vehicle slowed down and returned back to the road to the tarred road. As he had joined the tarred road, I thought he would find a place to stop but unfortunately he just kept on driving. I wondered as to why the driver did not stop as he had knocked an official stop sign...

The story goes on for another single spaced page to the end when the prosecutor then asks just one other question, 'Yes, can you tell this court the registration number of the accused person's motor vehicle? The whole examination was covered by just five turns at speaking between the prosecutor and the witness. This kind of co-operation between prosecutor and witness does give the strong impression that the witness has been

prepared by the prosecution just as much as counsel would prepare his witness to answer questions in direct examinations and probably also in responding to questions under hostile cross examination. (also Harris 2001 p.68)

Harris (2001) reports that in her data extensive narrative sequences are in fact very rare. On this point, however, it would seem as if the data we work with sometimes limit the sort of thing we can theorise about. In my data, as has been demonstrated, narrative (even in the definition adopted and adapted by Harris from Labov 1972) is unlike in Harris's data (p.58), quite easy to identify as it is obviously extended monologue and has the features of narrative established by Labov and Harris herself and is a very recognisable feature of direct examination data of this study.

Harris proposes a model of analysis of evidentiary narratives, which includes four main elements as against Labov's five. These are:

Orientation – the circumstances which surround the narrative account.

Core narrative – the account itself, i.e. what happened, including often what was said and seen as well as what was done.

[Elaboration] – [provides further details, clarification, explication, etc. of the core narrative]

Point – significance of the narrative account for the larger trial narrative, i.e. usually the guilt or innocence of the defendant, addressed to the jury.

These elements are then applied on a number of excerpts of Harris's trial data. It would be an informative exercise to make an analysis of the evidentiary narratives of this courtroom applying the Labovian model but it would be too lengthy a task to attempt here where the focus of the thesis is not on this aspect of the trial alone.

The final argument relates to the place of narratives in the trial. Bridging the agreement gap between O'Barr (1982)'s account of narrative and fragmented evidence and Harris' (2001)'s argument that all courtroom narratives are fragmented, Gerwitz (1996) very succinctly makes the explanation that a trial consists of fragmented narratives and narrative multiplicity. And that

To be sure, the skilful lawyer is always shaping the fragments and, at least implicitly, pointing to the whole. But not until the very end of the trial, with the lawyers' summations, does either side have a chance to put the pieces together and to present a flowing, uninterrupted narrative to the decision maker. In addition, one side's narrative is always being met by the other side's counternarrative (or sidestepping narrative) so that 'reality' is always disassembled into multiple, conflicting and partly overlapping versions... It is the fragmentation and contending multiplicities of narratives, regulated by special rules of narrative form and shaping, that mark the central distinctiveness of narratives at trial – along with... the high stakes in how the narrative combat is resolved (Gerwitz 1996 p. 8).

7.4 Analysis of Cross Examinations

Cross Examinations transactions differ in marked ways by having a different type of exchange structure and being retrospective, as we shall see. The first cross examination I analyse is particularly interesting in that it followed on the last direct examination described (under the narratives section above).

Following the prosecution witness's long and confidently executed narrative, the same witnesses is cross-examined. The cross examination proceeds to traverse the path made by direct examination, systematically calling into doubt every point in the witness's narration. First, in a sarcastic manner, the counsel for the defense refers back to the narrative – 'Now, you have described to this court eloquently as to how this accident happened,' and then deals the first blow to the evidence by asking the question 'Would I be right to say that when the car moved out of the road, you couldn't see clearly as to what the cause was?' The witness is caused, expertly, 'to start backtracking on his evidence, 'I couldn't see clearly what was there.'

The moves made by counsel here are completely different, structurally, from the QA of the direct examination. The first Initiation move of the defense lawyer begins with a statement rather than a question. The effect of this structure is to comment on the preceding direct examination exchange. The statement is followed in the same turn by a question, which is itself not a real question but an assertion - you couldn't see clearly the cause of the accident – embedded in a question 'would I be right...? The Response from the witness is to admit that he could not see the cause of the accident, which he has just 'eloquently' described. The next move is in fact a third part, a Feedback move. So here, unlike in the direct examination, we have the three-part structure similar to Sinclair and Coulthard's original classroom exchange i.e. Initiation Response Feedback, IRF.

Excerpt 1 Case number 3 10-01-2000 Supplementary Data

Defense Counsel: Now, you have described eloquently to this court as to how the accident happened. Would I be correct if I say that when the car moved out of the road, you couldn't clearly see as to what the cause was?
Witness: I couldn't see clearly what was there.
Defense Counsel: Yes, because there was another car in front of you.

Excerpt 2 case number 3 10-10-2000

Defense Counsel: Now, all the way up to when the cars in front of you did you see any other anything unusual in the traffic?
Witness: No.
Defense Counsel: You didn't. So the only thing that you saw in the traffic was the hitting of the no stopping sign?

Excerpt 3 case number 3 10-01-200 Supplementary Data.

Defense Counsel: I am not interested in the turning now you gave the evidence about one of the observations you made. That gave you the suspicion that he was drunk. You said you saw when you looked at him as he was talking to you saw eh blood spots in his eyes, his eyes were red?
Witness: Yes.
Defense Counsel: I put it to you that his eyes have those blood shot that you have been talking about. Can you dispute that?
Witness: Yes.
Defense Counsel: It was your first time to see him.
Witness: That was my first time to see the accused.
Defense Counsel: Yes You didn't know him.

Excerpt 4. Case number 3 10-01-200

Defense Counsel: Take a closer look at his eyes. Are his eyes red?
Witness: Yes, they are.
Defense Counsel: They are. Does this suggest that he is drunk?

The following table displays the structure of the cross-examination exchange with its three slots, to be contrasted with the table of the direct examination sequence.

Move	Realisation	Example
Initiation	Statement +Question: Closed	Now, you have described eloquently to this court as to how the accident happened. Would I be correct if I say that when the car moved out of the road, you did not see clearly as to what was the cause?
Response	Answer	Yes
Feedback	Statement: reinforcing the admission	Yes, because there was another car in front of you.

Table 12 The IRF structure of the cross-examination.

What does this IRF structure of the cross examination imply about the relationship of the attorney and the witness? Maybe the domineering attitude of the attorney towards witnesses, much like a teacher dealing with pupils? And perhaps the witness expects feedback on his responses even though feedback is only damaging his story?) Bulow-Moller (1990 p. 52) observes that the third turn is frequent in ‘institutional discourse.’ For instance in medical interviews, ‘the third turn is non-committal (“Aha”, “OK”), as the doctor’s aim is to extract the fullest possible statement from the patient; in teaching situations, on the other hand, the third turn is used to evaluate (“Yes, good”). As we saw in the direct examination of this study, however,

‘the third turn is not normally described as part of the adjacency pair in interrogations.’ That is why Heritage (1985 p. 98) assumes that it is ‘massively absent.’ In Bulow Moller’s (1990) trial data, however, ‘the examining counsel routinely uses the non-committal third turn to signal that an answer is acceptable (“yes”, “ok”) etc. The third turn in the data of the present research cannot really be said to be non-committal. It is perhaps partly evaluative, rather like a teacher’s; but it has another, rather subtle intention, that is, to put the witness at a disadvantage by repeating his admissions and putting them on record, explicitly, probably for the magistrate. The contains faintly violent overtones as it mostly underscores (for prosecution), undesirable repudiations of the former testimony.

The defense counsel continues in this way to question every statement made by the witness in the direct examination. The question may be asked why these exchanges are so dissimilar in structure. The answer may lie in the different purposes of the questions in the examinations and in the different attitudes of the prosecutors and counsel towards the witnesses.

7.5 Power in the tenor of examination discourse

Tenor refers to who is taking part in the discourse: their statuses and role relationships. The question of power does not come out clearly in the tenor of direct examinations. This is because normally the direct examination is a situation where the prosecution and the witness act co-operatively to build up the story in support of prosecution. So there is no tendency, in direct examination, for the questioner to want to control and dominate or otherwise

coerce his witness. This is even more so in this courtroom as the prosecutor and the witness (in traffic offences) are both police officers acting in tandem and are of equal status. The sharing of power is most clearly revealed when the prosecutor allows the witness lengthy turns at speaking, usually narration of events proving the guilt of the accused. As Bulow-Moller (1990 p. 45) puts it the prosecutor uses open-ended questions when he wants 'an account in witnesses' own words, in order to establish credibility... In handbooks as well as in the linguistic literature, it is assumed that open questions are found almost exclusively in examination-in-chief; it would be counter-productive to give a hostile witness too much of an open chance to explain himself.'

The defense counsel, on the other hand, tends to assume very powerful positions in their relationship with the prosecution witnesses. They are almost openly hostile and coercive in their use of linguistic devices of questioning and in their insistent repetition of questions that are aimed at discrediting the witnesses' earlier statements made under direct examination. (See the excerpt under types of exchanges when counsel repeats the same question three times, insisting on a Yes or No answer)

Also in the following excerpt we see the defense counsel using repetition of same question to force out an admission from the witness.

Counsel: Now you say that the results obtained some 3 hours after driving is a true reflection of the amount of alcohol in the suspect at the material time?

Witness: Your Worship it might have gone down.

Counsel: It might have gone down it might have gone up it doesn't matter. What I am saying is would it be a true reflection of the amount of alcohol at the time of driving?

This tendency for examining counsel to demand the answer desired by them is very characteristic of cross-examining counsel. The important question to ask is where does this right originate? There are at least two sources of origin of this power. These are legal training, and the linguistic advantage of the onus to ask questions resting with legal counsel. I shall begin discussion of these sources with the training aspect. Although we have seen in our discussion of legal education's neglect of courtroom practice, for example, courtroom speech making we have also noted that much of what lawyers do in the courtroom is learnt from trial manuals, many of which perpetuate the ideology of unequal power relations between counsel and witnesses, which is vehemently criticised by the writers of the critical perspective. See for instance Goodrich (1984), Witten (1993), Thompson (1984) and Harris (1994). These critics all point out the fact that power relations cannot be understood outside the context of ideology and culture. Witten (in Mumby 1993 p. 104) theorises that 'Control is effected through culture when capacities that benefit the organisation are 'organised in'... while alternatives are organised out.' Witten does however see the future of critical theory in a much more circumspect light when she says that, 'the challenge of post-structuralism suggests that critical theory will only survive in a much attenuated state, if indeed at all, ' and that 'others maintain that it is still possible to maintain some of the goals of critical theory scaled down to an appropriate scope.' (p. 104)

Thompson (1984, p. 9) suggests that '...ideology can be analysed specifically and concretely in expressions which are uttered in the course of

everyday life.' The ideology of the legal profession comes out very clearly in trial manuals. Walker (in Kedar 1981 p. 61) quotes Morrill (1971 p. 61), in a text on trial tactics, as saying that 'the examiner should immediately take measures to correct the situation (where a witness has not given the desired response). He must be in complete control at all times.' Summit (1978 p. 129) is quoted as saying that, 'Witnesses occasionally will answer a question with a question. The examiner should not become involved in the explanation of the facts or the points he is trying to make. He should explain to the witness that it is not appropriate for the examiner to answer questions.' Walker writes that in the course of her data collection she asked lawyers if they would allow a witness to ask them a question their replies are informative:

1. "No, I'd tell him 'I'm not here to answer your questions'"
2. "I'd say, 'I'll ask the questions and you are here to answer.' That's when you have to take control and intimidate"
3. "A witness can't elicit a response from an attorney."

(Walker in Kedar 1983 p. 61.)

So the idea that counsel must maintain a position of power vis-à-vis the witness is an open secret and, as Walker says, 'Power as I have noted repeatedly is equated with control of the witness, and one kind of control is exerted through leading the witness to the desired answer.' It seems to me that lawyers on opposing sides, i.e. prosecutors and defense counsel, exercise this power very differently. I have noted before that the prosecutor treats his own witnesses as equals, acting in co-operation, but defense counsel treat

prosecution witnesses very harshly, coercing answers from them and generally intimidating them.

However, before we completely condemn counsel, we must recognise that they are attorneys at law. The witness is not fighting the battle alone. He usually has his own attorney to advise and prepare him or her for the ordeal of the trial. If this were not so, courtroom relations would be completely insupportable. The relations most often criticised are those between the examining counsel and opposition witness. But I want to observe that this is not the only power matrix in court. There are also power relations between attorney and attorney in submissions, which are much less documented and this is the point of departure for this particular research into courtroom language, representing largely untraversed territory in studies of courtroom language - the battle between giants, full of hyperbole, sarcasm, deprecation, derision, etc.

The second source of the power of counsel over witnesses in the evidentiary portion of the trial is the control they are accorded by having the onus to ask questions. This power arises from the fact that 'a question is a powerful thing' (Walker 1987p.59). A question demands an answer and by asking questions counsel are exerting a natural force on witnesses. Walker argues that question types differ in their coerciveness.

Yes/No questions are said to be more coercive than Wh questions and within the category of Wh questions the imperative question like 'give me your name' is 'both less polite and more blatantly an exhibition of role power than

the mediated cooperative question form ‘would you give me your name.’ (p71). Phillips (1987) reports from her research on the use of questioning in the courtroom that the approaches to the use of question in the courtroom have been concerned with the expression of power relations.

In the literature, different questions are carefully distinguished, and viewed as varying in the degree of control the questioner attempts to exert over the intended respondent. In general, Yes-No questions have been characterised as expressing the intent of greater specificity and narrowness of response than Wh questions. Declarative Yes-No questions, particularly those with tags such as ‘‘You were at the bar that night, weren’t you?’’, are perceived as more controlling and coercive than Inverted Yes-No questions because they presuppose the answer as well as limiting it to yes or no. (Phillips 1980 p.84)

Researchers such as Danet et al (1980) Danet and Bogoch (1979) and Woodbury (1984) are reported to have found higher frequencies of Declarative Yes-No Questions in Cross-examinations than in direct examinations in American trial data. Phillips (1985) concurs with Walker (1985) that ‘cross-examinations are defined by lawyers (and rules of evidence) functionally as calling for more aggressive tactics as one attempts to break down and undermine the witness’s confided credibility’ (Phillips 1995 p.85).

7.6 Control and resistance to control

The important question to ask here is this. Considering the enormous power vested in lawyers as representatives of the law, the right to coerce desired answers from defendants and witnesses, what can the witnesses do to maintain their own position in the trial without being totally victimised by

legal culture? Atkinson and Drew (1979) and Drew (1985) suggest that witnesses (police witnesses) can and do challenge counsels' competing claims about their actions by producing justification and excuses for their actions in relation to the charges. They can also do this by producing alternative accounts to counsels accounts as borne out by my data. Witness coercion by counsel comes out very strongly in this data. I have given examples of them doing this by re-initiations and insistent repetition of the same question:

Counsel Now, you said Thabang was knocked at the zebra crossing?

The witness dodges answering the question by claiming incomprehension

Witness: I don't understand the question

And counsel repeats the question:

Was he knocked at the zebra crossing or was he not knocked at the zebra crossing?

Witness buying time keeps silent and counsel repeats:

Counsel: Yes or no, was he knocked at the zebra crossing or was he not knocked at the zebra crossing?

Witness: I didn't see.

The question is on the surface not particularly difficult to answer, so why does it take several promptings for the witness to address it? One possible interpretation is that the witness is buying time in order to decipher the possible implication of the question and consider the possible implication of her answer even though there is nothing in either the question or the eventual answer to indicate what she might have thought the import of the question was. But in the next exchange the witness answers the question in a manner that shows that she is anticipating blame on her part by the counsel for the defense:

Defense Counsel: Now you said it was nine o'clock at night?

Witness: The lights were on.

Here the witness responds by making a qualification of counsel's question so that whatever it is intended to do to her evidence, it will have been mitigated by her answer. This cross examination involves a lay person witness. Police witnesses sometimes openly challenge counsels' assertions.

Defense Counsel: So I wouldn't be wrong to if I said it was around 10.30 p.m.?

And the witness makes a blatant rebuttal:

Witness: If it wasn't you would be wrong

Defense Counsel: But that was the time written in this statement.

Witness: Yes in fact it is the time

Defense Counsel: Which is a period of more than three and a half hours.

Witness: Yes Your Worship.

Defense Counsel: So why did it take so long in subjecting the defendant to a breath test?

Witness: As I said earlier, the witness was co-operating in that he was taking a long time to understand all what I was saying to him.

In two places in this exchange the police witness produces answers which are dispreferred second pair parts. First he almost rudely answers 'If it wasn't, you'd be wrong' and then accepts that he had in fact written that the time was as counsel for the defense stated. This is open hostility on the part of the witness. In the second instance, the witness tells counsel that he had already answered a question to the effect by stating, 'As I said earlier...'

Open combat also happens when the witness and the prosecutor use strong language that is indicative of accusation:

Witness: I am here to tell the court the truth. The vehicle got out of the road and hit the sign, turned ...and Counsel interrupts: Counsel: I am not interested in the turning...

Here we see counsel insisting on following a line of thought he is developing and insisting on the witness producing only answers to his stated question and no elaboration from the witness. The witness on the other hand seems to suggest that counsel is doing more than just attempting to elicit the truth.

Such interchanges indicate that witnesses sometimes react consciously to the strongly coercive tactics of counsel so they do not have their hands tied completely by the rules of evidence which give attorneys a lot of power over the discourse.

Summary

In the analysis of the dialogues of examinations in this chapter, I have made a number of interpretations. In their order these are (1) the power of legal professionals over laymen in the courtroom. This asymmetry in the relations between professional and laymen needs explanation. However I have also shown that litigants do try to contest this domination. Other interpretations are those of the role of routine in the everyday processes of institutions and the role of narratives in examinations especially the different uses of narratives in direct as against cross-examinations. All these are made possible by the use of discourse analysis methodologies.

Another important linguistic aspect of this courtroom is its bilingual nature. Therefore we will now turn to discussion of bilingualism evidenced in both kinds of examination but also in other transactions like the Reading of charge Sheets and the magistrates' turns at speaking. This is the subject of the next chapter, Chapter 8.

SECTION D: BILINGUALISM IN THE COURTROOM

.

Introduction

Bilingualism is a characteristic of this court's communication processes and it is linked especially to the dialogues of examinations and the administrative processes of the reading of charge sheets and readings of facts. This is so because these processes involve the litigants who may or may not be bilingual in English, which is the language of the magistrates' courts in Botswana, and Setswana, which is the national language. To accommodate these people in the processes of the court various types of language alternation, mainly code switching and interpreting, are found in the communicative processes in the courtroom. Interpreting is formally provided for statutorily, as I shall outline in chapter 9, but other bilingual discourses occur as natural language phenomena and are less governed by statutory requirements. I shall begin discussion of this phenomenon with code switching because it follows on from the discussion of the dialogues of examinations. Then I shall discuss, in a separate chapter, interpreting and interpreted proceedings.

CHAPTER 8. Code Switching

8.1 Previous writing on bilingualism and code-switching

Code switching is one of a multiplicity of phenomena of language contact and its concomitant bilingualism. Auer (1998 p: 32) asserts that there are many phenomena of language contact other than code switching –

borrowing, transfer, interference, intergration, mixed codes and others. There is a vast literature on code switching representing code switching between many languages of the world. I shall not here attempt to review this literature but only abstract from it the common ground and the major theoretical constructs developed.

8.1.2 Code Switching defined

The discussion of code switching starts with Weinreich (1953) as the first to recognise the phenomenon but who gave it only a passing consideration in

Languages in Contact in this one paragraph:

The ideal bilingual switches from one language to another according to appropriate changes in the speech situation, but not in a single unchanged speech situation, and certainly not within a single sentence. If he does include expressions from another language, he marks them off explicitly as 'quotations' using quotation marks in writing and special voice modification in speech... '.

He proceeds to suggest that switching codes in any other way may represent a language problem. Milroy and Muysken (1995) offer an explanation for this 'invisibility of code switching' to seminal figures like Weinreich. They attribute their lack of awareness of code switching to four factors. The first is their focus on the 'langue' of the bilingual language system and not the 'parole' or actual bilingual use. The second factor is the structuralist idea about the integrity of grammatical systems, within which code switching or code mixing were seen as potential disturbances. Thirdly, the lack of sophisticated unobtrusive recording, because obtrusive recording yielded bilingual data which contained much less code switching and code mixing. Fourthly, there was a lack of stable bilingual communities, studies of which

became the focus in the 1970s when Spanish/English and Hindi/English bilingualism were studied and code switching came to the fore.

Confirming the existence of code switching as ‘a central part of bilingual discourse’ (Romaine 1989 p: 118), Bell (1983) enthusiastically asserted that:

Code switching is an active, creative process of incorporating material from both languages into communicative acts. It involves rapid and momentary shifting from one language to another within a single conversation and is not uncommon within single sentences.

Dulay et al (1982) also went further in clearing misconceptions to make way for objective discussions of code switching by pointing out that:

The rapidity and automaticity with which such alternations take place often give the impression that the speaker lacks control of the structural systems of the two languages and is mixing them indiscriminately. However, quite the contrary is true. Those bilinguals who are most proficient in both their languages often engage in code switching. (Ibid p.115)

Gumperz (1982 p.55) observed in code switching that,

‘Speakers communicate fluently, maintaining an even flow of talk. No hesitation pauses changes in sentence rhythm, pitch level or intonation contour mark the shift in code. There is nothing in the speech to indicate that speakers don’t understand each other.

And Grosjean (1982) asserts that code switching is an extremely common characteristic of bilingual speech and that some bilingual writers and poets reflect this in their works. He gives this poem by the Mexican American Pedro Ortiz Vasquez, which I think illustrates how conscious use of code switching (as most writing is conscious manipulation of language) can achieve its aesthetic, literary effects:

It's so strange in here
 todo lo que pasa
 is so strange
 y nadie puede entender
 que le pasa aqui
 isn't any different de lo que pasa alla
 there everybody is trying to get out, etc

lost in our own awareness
 of where we are
 and where we want to be
 and wondering why
 It's so strange to be here
 (p.147)

Hundreds of examples of code switched utterances in hundreds of the world's languages exist, so much so that now examples are no longer intriguing in themselves.

8.1.3 Analytical models of code switching

Code switching, being such a complex linguistic phenomenon, has now led writers and researchers to the postulation of very many models on various aspects of bilingual usage. Below I shall present the latest of these and to create a backdrop of theory in which the analysis of the data I have of code switching in the Botswana court can be understood.

8.1.3.1 The situational approach

According to Li Wei (1998 p: 156): ' with few exceptions, sociolinguists who studied code switching before the 1980s directed attention to extra-linguistic factors such as topic, setting, relationships between participants,

community norms and values etc., all of which were said to influence speakers choices of language in conversation.’ All these studies followed the situational code switching approach suggested by Weinreich (1953) who argued that ‘the rapid alternation of languages in a single, unchanged situation’ did not happen and that ‘the ideal bilingual switches from one language to another according to appropriate changes in the speech situation’ (inter-locutors, topics, domains have since been identified as situations of code switching).

Gumperz (1982 p. 60) very lucidly describes the situational usage of code switching in relation to diglossia, the existence of different varieties of one language or the use of different languages in different situations and domains. He states that ‘in diglossia code alternation is largely of the situational type. Distinct varieties are used in certain settings, (such as home, school and work) that are associated with separated, bounded activities (public speaking, formal negotiations, special ceremonies, etc) or spoken with different categories of speaker (friends, family members, strangers social inferiors government officials, etc).’ These are the setting, domains and interlocutors dimensions of code switching. Gumperz (ibid p. 61) suggests that situational code switching happens mostly in formal situations such as the diglossia just described and that conversational code switching presents quite a different set of problems in that it does not happens with any perceptible change in situations and if it does the ‘relationship to language usage to social context is much more complex.’

Against this conventional view of code switching, Auer (1984), in *Bilingual Conversation*, raised challenges to this view of the functions of code switching. The concept of *Situation* itself was challenged on the grounds that it is not 'a predetermined set of norms functioning solely as a constraint on linguistic performance.' Rather, Auer saw situation as 'an interactively achieved phenomenon...' He argued that 'participants of conversational interaction continuously produced frames for subsequent activities which in turn created new frames' (restated in Auer 1998). Auer proposed a conversational analysis approach to code switching, and following this proposal Li Wei (in Auer 1998 p: 159) points out that:

'In conversational interaction, either bilingual or monolingual, speakers are faced with the fact that the situation is simply not defined unambiguously ...and even if the situation was fairly clear, to the co-participants, they simply do not have time to examine the current case for common features with similar precedent cases. Instead, their attention is paid, first and foremost, to the new case itself and each and every new move by their co-interactants.'

But if we invoke innateness of language processing procedures, perhaps the decision to switch to a different code takes as infinitesimal a time dimension as it does in a monolingual speech mode where focus is on 'each and every move by co-interactants.' This is so because as Gumperz puts it, even in conversational code switching, the interlocutors' main concern is 'with the communicative effect of what they are saying' and that 'selection of linguistic alternants is automatic and not readily subject to conscious recall.' (ibid p61) My argument is that bilingual processing is as natural and as automatic as monolingual processing. Unlike Li Wei here on conversational code switching which he believes is not situation based, Gumperz sees conversational code switching as part of communicative competence and

suggests that ‘the social norms and rules which govern language use (in code switching), at first glance at least, seem to function much like grammatical rules.’ He therefore proposes that,

‘Rather than claiming that speakers use language in response to a fixed, predetermined set of prescriptions, it seems more reasonable to assume that they build on their own and their audience’s abstract understanding of situational norm, to communicate metaphoric information about how they wish their words to be understood.’ (Gumperz 1982 p. 61)

So Auer’s suggestion that conversational switching cannot be situationally defined does not take cognizance of this earlier formulation of the communicative competence of the bilingual.

8.1.3.2 The ‘markedness’ approach

Similar to the situational approach of earlier studies is Myers-Scotton’s ‘markedness’ approach, which suggests that code choices are indexical of the right and obligations set (RO sets) between participants in a given interaction (which Li Wei sees as an abstraction derived from situational factors).

Myers-Scotton argues that interactional types are ‘to a large extent conventionalised in all communities and carry relatively fixed schemata about the roles, relations and norms of appropriate social behaviour including language behaviour.’ Myers-Scotton (1998) explains markedness in these terms: ‘the use of a particular code is viewed in terms of the unmarked versus marked oppositions in reference to the extent its use ‘matches’ community expectations for the interaction type or genre where it is used: what community norms would predict is unmarked; what is not predicted is marked.’ (p.5) She qualifies this statement by pointing out that these codes

fall in a continuum from more or less marked rather than being categorical. Myers –Scotton has produced various models and formulations attempting to account for code switching. These include the matrix language model, ML (1995), which is an explanation and analysis of the grammar of code switching and the Rational Choice Model, RC (2001), which explains the cognitively based social functions of code switching. These models signify the continuing struggle to pin down important elements of code switching

8.1.3.3 The sequential approach

The sequential approach is embedded in the CA approach to discourse analysis. Auer (1995 p: 117), proposing the approach begins with the question ‘Do bilinguals participants see and use code switching?’ which refocuses studies of code switching from ‘two structural systems referring to each other’ to ‘the speakers,’ He says that ‘this implies a shift from the structural to the interpretive approach.’ Auer prefaces his discussion by making the claim that his theory of conversational code alternation ‘should be applicable to a wide range of conversational phenomena...and to very different bilingual communities and settings.’

Auer (1995 p: 16) explains that sequential means the determining of a given code switched utterance by a preceding turn in the conversation and that

‘sequentiality of code alternation refers to both preceding and subsequent utterances, that is, the language chosen for a speech activity should be seen against the background of language choice in the preceding utterance.’ I understand this to mean that an explanation of the functions of code switching should consider what happens in one turn that leads to a switching of code in the next turn and back to the language of the conversation in the next turn or the sustaining of the language switched to in several turns. If this can be determined, then we can hazard a guess as to the function of code switching in the particular instance. Auer insists that ‘code switching can have conversational meaning even if used in a particular conversation only once.’ This means to me that we do not need a large corpus of code switched utterances in order to get at the functional analysis of code switching in the courtroom. Even used sparingly and occasionally, as it appears in my data, it can still be a subject of interpretive analysis.

8.2 My model

Code switching performs a wide range of functions and appears to be amenable to interpretation by various approaches. One approach is to be eclectic in explanation of the types of code switching and its functions. In fact one discussion that makes eclecticism possible and fruitful is Grosjean’s (1982) comprehensive abstraction of the factors influencing code switching which allows varying focus on a particular instance of code switching. He lists four main classes of factors being – Participant, situation, content of discourse and function of interaction.

The following table economically displays the factors influencing language choice.

PARTICIPANTS	SITUATION	CONTENT OF DISCOURSE	FUNCTION OF INTERACTION
Language proficiency Language preference Socio-economic status Age Sex Occupation Education Ethnic background History of speakers linguistic interaction Kinship relation Intimacy Power relation Attitude toward language Outside pressure	Location/Setting Presence of monolinguals Degree of formality Degree of intimacy	Topic Type of vocabulary	To raise status To create social distance To include or exclude someone To request or command

Table 13 Grosjean (1982) Factors influencing language choice

Grosjean (1982) points out that any one factor may account for choosing one language over another, but usually it is a combination of several factors that explains language choice. In my analysis of language alternation in the data of this study and effort will be made to search for the particular constellation of factors explaining a particular code switched utterance.

Some comparison between the code switching of litigants with that of magistrates will be made. Also code switching in the turns of police prosecutors and witnesses in examinations, a productive area for the type of code switching called language preference of co-participants in a conversation; the pattern described by Auer (1995 p: 125) as A1 B2, will be examined. Here speaker 1 uses language A and speaker 2 use language B, that is, different speakers prefer to speak to each other in different languages understood by both speakers.

In my research, one magistrate who code switches said that he has his own style of presiding. Later this style (also documented by Meeuwis (1998 p: 80) was demonstrated when, occasionally, in a very relaxed way he switched to Setswana when speaking to litigants. I interpreted this as serving to create a relaxed atmosphere in the court and putting a human face on the law when he includes the non English speaking litigants rather than excluding them from the proceedings by using a language they do not understand all the time. All the language alternations of various kinds seem to do just this. It means that the litigant is free to speak his own language and be listened to first hand, without interpretation and then be interpreted to when English is used in issues that relate directly to him such as in charge sheets, examinations, summaries of the facts of the case and in judgements. Submissions made by prosecutors and counsel to the magistrate, are not interpreted to the litigant because although they concern the litigant, they are addressed to the magistrate not to the litigants.

But before we introduce the analysis of the Botswana courtroom data it is helpful to the reader to indicate the context of Botswana that relates to the uses of languages in the courts.

8.3 The courtroom context for Bilingualism

I shall discuss bilingualism in the Botswana courtroom in the context of other known bilingual courtrooms viz. the United States courtrooms as discussed by Susan Berk-Seligson in her book named *The Bilingual Courtroom* (1990) and the Malaysian courtrooms as discussed by Mead (1985) in his monograph *Courtroom Discourse, English Language Research*.

The Botswana magistrate's court is bilingual in ways other than only in allowing for interpretation. There are at least two languages used in the courtrooms' everyday proceedings. These are English, the official language, and Setswana, the national language. (Later, with analysis of tape-recorded proceedings of the court supplying the data, I shall show how these languages are used.)

The general language context of the United States, at least the most studied context, is one where the speakers of other languages other than English are minority populations. So it appears as if the only way to recognise the existence of other languages in the courtroom is through providing for interpretation. The language situation of Malaysia, which is officially bilingual, is significantly different. Mead (1985) showed in his survey of

Malaysian courts that 'courts are evenly balanced in their choice of language. Many courts use both languages within a single case, switching from one to another in deference to the racial identity of a witness.' The Botswana situation is yet another type of language situation. Here the law does not allow for use of other languages except through interpreting, but the empirical situation will be seen to be sufficiently different as to warrant description and typological analysis. The lack of study of this situation may make it seem as if the policy is one in which languages are not in contact in any significant way. For example what would the law do if it found out that the language statute was not rigidly adhered to by relevant parties to court? Would it consider the situation unacceptable or would it legislate in keeping with the real, sociologically documented language reality? It is a third type of language situation in that the language of the court is also a minority language unlike the United States' situation where the language of the court is the language of the majority, which makes it sufficient to merely provide for interpretation for defendants and witnesses who do not understand and speak English. A situation in which the minority, magistrates, prosecutors and counsel, are bilingual in both English and Setswana and most of the people they serve speak only one of their languages (Setswana) is bound to have special characteristics of its own. These are the characteristics this study of bilingualism and the use of languages in a court of law in Gaborone in Botswana seeks to analyse and describe, hopefully to contribute to the literature on bilingual usage in the courtroom domain.

8.4 Analysis of bilingual courtroom data

I will now examine and interpret the bilingual data from this courtroom from the perspective I have outlined in 8.2 focusing not only on the grammar of code switching but also on its functions..

First, we want to note that the bilingualism of the Botswana courtroom is pervasive and can be seen in the various courtroom processes. It comes up in the examinations transactions, the readings of charge sheets in court, readings of the facts of the case before judgements and in the speech of both courtroom officials like magistrates and interpreters and in litigants' speech. The kinds of bilingual usages of various courtroom processes and persona are very interesting and may even be specific to Botswana, therefore providing us with a new terrain to traverse in the theory of bilingualism. To discuss this particular instance of bilingualism is to experience the power of language in use.

From observation in the field and from transcription of courtroom proceedings it soon becomes clear that two languages are in use by different court participants. We can begin with the question of who uses which language in the courtroom and then go on to the various courtroom processes in which two languages are used.

8.4.1 Who speaks which language?

First, many litigants use Setswana but often understand English enough to respond to it without translation. This creates the kind of bilingual use described by Li Wei (1994:152-153) as Level B, when speakers use different languages in consecutive turns. This type of code switching may be called ‘language preference switching.’ Li Wei theorises that this kind of switching is found in conversation involving participants of different language abilities and attitudes. In his data code switching is overwhelmingly at this level. In this courtroom data this theory seems to hold. It seems to me that the reason why a litigant will consistently respond to a statement (in the courtroom data normally a question) in a different language from that in which the question was phrased must have to do with the fact that the language of the question is understood well enough, but perhaps not spoken well enough to attempt to respond in it. This was the case in one whole direct examination in which the prosecutor put all his questions in English and the witness answered all these questions in Setswana. To go back to the model I have selected to use, what factors seem involved here? From the PARTICIPANT FACTORS COLUMN, it seems reasonable to invoke the language proficiency, language preference, socio-economic status and the education factors as the constellation of factors that explain the following type of code switching. SITUATION factors do not seem activated as the location/setting and degrees of formality or intimacy do not seem capable of explaining this particular appearance of code switching. We would expect the location/setting and degrees of formality and intimacy factors to preclude

code switching in the court context, which is characterised by a formal tenor, but code switching occurs in this setting. In fact all other factors seem irrelevant to the appearance of this code switching. So this data establishes the fact that code switching occurs in a range of situations from casual conversation to formal contexts like courtroom examinations depending on the particulars of participants like their proficiency, preference, socio-economic status and levels of education. From observation, I would describe the woman who answered all the questions put to her in English in her own first language, Setswana as educated (English is only acquired in Botswana through schooling), as proficient enough in English to understand fully the questions put to her in English but as preferring to answer them in Setswana. Her socio-economic status is middle class (she owns and drives a car). The following excerpt is from a direct examination that was conducted wholly in this mode.

Excerpt 1.

A. Prosecutor: Where did you say the accident happened?

B. Witness: **Gone mo Broadhurst fa o hapaanya strata se se tswelang ko...** (inaudible)

(Here in Broadhurst when you come to cross that street which goes out to (inaudible))

A. Prosecutor: Could you tell this court what happened?

B. Witness: **Nna erile ke tsamaya mo streiting hela ke labile go go ema ke bone koloi e nngwe e tshweu e tswa kwa pele ga me ebe e tswa mo teng ga tsela.**

(Me while I was driving along the street just about to stop I saw a white car coming from the opposite direction and then it got out of the road.)

A. Prosecutor: Yes. To what direction was this motor vehicle which collided with you?

B. Witness: **E ne e tswa** (inaudible)

(It was coming from (inaudible))

A. Prosecutor: Did you have the chance to see the registration number?

B. Witness: **Ga ke ise ke nne le chance ya go leba registration number ka nne ke shokegile.**

(I did not get the chance to look at the registration number because I was shocked.)

A. Prosecutor: Yes. Were you alone?

B. Witness: **Nne ke na ke rre M. M.**

(I was with Mr M. M.)

A. Prosecutor: Can you tell this court what could have caused the accident?

B. Witness: **accidente e kane e causitswe ke gore rre erile ha koloi e sena go ab a tla ko gonna ...Mme o ne a lebega a thetheekela a nole bojalwa.**

(The accident may have been caused by that this gentleman after the collision came to me and said its you who caused the accident ... but he was staggering as if he was drunk.)

A. Prosecutor: Why do you say the accused person was drunk?

B. Witness: **Nne bo nkg a mo go ene ebile o ne a nkatumetse ha a nthaya a re ke mothudile.**

(I sensed a smell of alcohol on him as he was close to me when he told me that I had hit him.)

The whole examination is conducted in this mode up to the end, with questions put in English and answered in Setswana. As can be seen from my translation, the answers are appropriate to the questions. The witness understands English but does not elect to speak it in this case. So, going back to the point about who speaks what language, we see here that the prosecutor speaks English as English is the language of the magistrate's court in Botswana, but the litigant speaks Setswana. This is a bilingual situation in which two languages are in use not only through interpretation. But the situation is even more complex in that the other participants – the magistrate and various counsel – listen to interchanges involving both languages and make their record of both contributions in English. What the magistrates actually record would be very interesting to analyse if we could find an examination, which ties well with the record. Data collection was not, however, sensitive to this aspect of the proceedings and therefore there is no data to exemplify the phenomenon of listening to one language and recording in another. What record we do have is that of a magistrate recording of

narration by a witness, (which came as part of one magistrate's written judgement of a case which I was offered) This record sounds like a near literal recording of a narration which may have been originally in Setswana.

The narration as recorded by the magistrate goes like this:

I was at the lands sitting on the shade under a tree within the yard.
 My yard is not very far from the kraal. I saw police officers kraaling
 The goats and closing the kraal and I saw them go away to fetch our
 goats. I
 I saw them kraaling them. I did not count the goats which they kraaled
 first. I
 Saw them kraaling our goats, they were many.

The cross examination then continues with one statement by the defence counsel and an answer which are recorded as such:

Q. I put it to you that you are misleading the court by stating that some
 goats

Were taken from Rraniri's farm.

A. I am not misleading the court in any way.

Mead (1985 p. 14) observed a similar phenomenon in the courts in Malaysia.

He says that 'it is normal for a magistrate's notes of evidence to be represented in first person narrative form.' And also that 'the witness spoke in Malay but the evidence was interpreted and both it and the subsequent judgement were recorded in English.' The effect of not requiring Setswana to be interpreted into English for the court is to make the atmosphere of the court friendly for the litigant. It makes court proceedings relaxed and less strenuous. It has been suggested or even 'established,' however, that institutional written records such as that of police interviews of suspects, is not always above board (Coulthard 1996, 'The official version' pp.165-178). So the windfall of being able to speak in your own language and be listened to by others who speak more languages that you may be tempered with this possibility of misrepresentation. Notwithstanding Coulthard (1996),

however, where he argues that courts did collude with the police, both as institutional members, (as for instance when he says that ‘...the police and the Courts collaborated in the pretence that police officers could remember what had been said in an interview or even during a house search and arrest so accurately that they could be relied upon to write up a verbatim record hours after the event’ (p.169)), it is difficult to see why the magistrates and counsel would knowingly produce a false record of the proceedings. The two situations are also different because the police wrote their records several hours after the event and the magistrate and counsel write theirs simultaneously and can always hold the proceedings on wait while they are writing.

Still on the question of who speaks what language in this courtroom, we find that all participants are not equally constrained as to which language they should speak. Prosecutors are the most constrained linguistically in this courtroom. Although Setswana is universally (in this courtroom) listened to, it is legally spoken only by the litigant. The prosecutor is sternly enjoined to speak English by the magistrate when he or she is tempted to express things in Setswana. The prosecutor does not even code-switch to Setswana. This is a valid observation borne out by data-coding; prosecutors speak only English in the courtroom, yet counsel can get away with an occasional switch for clarification to the litigant but only very briefly. An example is one case involving an old man who often ventured to speak English even when sometimes it confused the court. It was a case of stock theft, which is

normally dealt with better in Setswana language kgotla (customary court).

The defense counsel at one point had to ask this prosecution witness:

Defense Counsel: A o kile wa duelwa madi mangwe ke defendant ka ga kgomo ena?

(Were you ever payed any money by the defendant relating to this cow?

Witness: No

At another juncture defense counsel requested the old man:

Defense Counsel: Can you say that in Setswana to get it clear?

Witness: Re ne ra omana. Ke be ke mo raya ke re ka tsone dilo tse tsotlhe ke go isa court(e) ka tsone.

(We quarrelled and I told him, 'for all these things I am taking you to court).

8.4.2 The language of the presiding officer: The Magistrate

The case of the magistrate however is very different. He is the least constrained linguistically. But before I seem to be making the claim that magistrates in this court speak Setswana at will, that is without regard for the Magistrates Court Act, it is necessary to describe the place of the magistrate in this linguistically complex domain. He or she presides in a multilingual courtroom and there are pragmatic implications for this role. He must hear most people in the language they choose to speak in (mostly Setswana which he or she, in this court, understands and can use.) It is not surprising therefore that he will occasionally address the litigant in this language. In this data it has been only in addressing the litigant that the magistrate has used Setswana, never to the prosecutors or to counsel. However even magistrates differ in the language they use to conduct a trial. There were four magistrates whose proceedings were tape-recorded. Two were woman magistrates. One

code-switched intrasententially, the other aided her clerk in translating the charge sheet from English to Setswana 'simultaneously' in court. Of the two men magistrates, one never used Setswana even when addressing the litigant.

Excerpt 1 case number twenty

Magistrate: Do you have anything to say accused?

Interpreter: Gatwe a go na le se o batlang go se bua?

(It is said do you have anything to say)

Accused: Nnyaa rra ga seyo.

(No sir, there's nothing)

Magistrate: Tell him to come on the 11th of March.

The other Magistrate(man), however was not averse to addressing the defendant directly and in Setswana.

Excerpt 2 case number 1 06-08-99.

A: Accused: Ke kopa go ntsha submissione fa pele ga lekgotla.

(I request to make a submission before the court.)

B Magistrate: Why do you want to submit today?

C. Interpreter: Ke eng o batla gontsha submission es letsatsi la tsheko?

A. Accused: Ke gore ke ne ke ithaya ke re (inaudible) Go mo toronkong mo ke a sotlega. Ga ke robale sentle gape ke robatswa ke ke bewa fa gare ga batho ba ba lwalang. Yo mongwe o lwala hela malwetse a dintho o mongwe o bolawa ke T.B. Ke robatswa ha gare ga batho ba ene re pitlagane.

(It's because I thought (inaudible) at the jail there I am suffering. I don't sleep well. I sleep between people who have diseases the other one suffers from diseases of sores and the other suffers from T.B. I am made to sleep between these people and we are packed close together.)

B. Magistrate: Jaanong o batla go hudusetswa ko main prison?

(So you want to be transferred to the main prison?)

A. Accused: Ha lekgotla le mpona molato.

(If the court finds me guilty.)

B. Magistrate: Jaanong ko main prison gone ga goa pitlagana?

(Is the main prison not crowded?)

A. Accused: (silence)

B. Magistrate: Report to this court in 21 days. I will call upon the prosecutor to help you solve your problems.

This interchange can be analysed by an adaptation of Li Wei's (1998:166)

schema. He analyses speaker, language and function in the same ways I do

here but I include the function of interpretation, accused person’s silence and magistrate’s closing.

Speaker	Language	Function
A: accused	Setswana	Request
B: magistrate	English	Question
C: interpreter	Setswana	Interpreting to accused
A: accused	Setswana	Answer
B: magistrate	Setswana	Question
A: accused	Setswana	Answer
B: magistrate	Setswana	Question
A: accused	Silence	Uncertainty
B: magistrate	English	Closing: Command and reassurance

Table 14 Language choices and functions in an exchange between a magistrate and a defendant

The first exchange in this interchange involves three participants, the middle participant being the interpreter. But in the second exchange the magistrate dispenses with interpretation and speaks to the accused directly in his own language. The purpose seems to be that the magistrates wants to give the accused the chance to speak but at the same time to upbraid him for having

put himself in a situation where he has to be in prison at all. He closes the interchange a command in English, seemingly re-distancing himself from the litigant by speaking in the language of the court, thus reverting to the correct tenor of the courtroom's formal role relations. This is the administrative 'style' of one magistrate who intimated to me that he has his own style of presiding. It included using two languages effectively and judicially.

We move now from focusing on who speaks what language to where in the judicial process different languages are used together. This area also has its own uniqueness to this courtroom.

8.4.3 Functions and types of code switching.

Code switching is said to serve several functions by various researchers.

Appel and Muysken (1987) offer several functions that they say are built up from the 'extensive' discussion of the question in sociolinguistic literature.

They discuss the question of why people switch languages in their interaction from the functional perspective.

In their analysis, the first function of code switching is the referential function. This is the type of code switching that bilinguals are most conscious of. They give the reason for switching as arising from lack of knowledge of a word for a thing or an idea in the language they are currently speaking or that the language they switch to is more appropriate for talking

about the particular subject. Myers-Scotton (1979) gives an example from a university student in Kenya who switches between Kikuyu and English.

Ati kiri ANGLE niati HAS ina DEGREE EIGHY nayo, THIS ONE ina mirongo itatu kuguori, IF THE TOTAL SUM OF THE TRIANGLE ni ONE EIGHTY ri IT MEANS THE REMAINING ANGLE in ndigirii mirongo mugwanya. (cited in Appel and Muysken 1987 pp. 118-119)

This function may be the reason why some litigants (in my data) switch to English from Setswana for expressions like '*ga ke minde.*' The concept in Setswana does not exactly match the English concept. The litigant could say the concept nearest in meaning to 'I don't mind,' which is '*Ga ke tshwenyege.*' Which means 'It does not bother me.'

Poplack (1980) in particular suggested the expressive function of code switching, which comes into play when code switching is engaged in simply to indicate the identity of people who use two languages (cited in Appel and Muysken 1999 p.119). This seems to be the motivation of some Batswana who write code switched columns for newspapers. It has also been observed in this courtroom by this researcher when the magistrate occasionally switches to Setswana during the proceedings. I have said before that it seems to remove the magistrate from the heights of the role he plays in court to the level of ordinary mortals and helps him identify with and may be even empower the non-English speaking litigants by putting a human face on the law.

Several other functions are discussed by Appel and Muysken (1999), which I do not think are relevant in a formal context like the courtroom. These are the phatic or metaphorical function, which serves to indicate a change of tone in conversation and the metalinguistic, which involves commenting on the language, used just to show off linguistic skill and the poetic function.

To turn now to the Botswana courtroom, it is important to note that code switching in this courtroom is engaged in by those participants who are least constrained to speak only one language, that is, litigants and some magistrates. As the literature on code switching has established, code switching is a legitimate communication strategy among bilinguals. It is seen as 'a central part of bilingual discourse' (Romaine 1989 p. 118) and quite enthusiastically described as such by Bell (1983) and Dulay (1982). It is not surprising, therefore that whenever people know that they both speak the same two languages they switch between those languages when they speak to each other. This is very well exemplified by the speech of the one magistrate whose presiding style included deliberate or 'rational' language choice (Myers-Scotton 2001).

Prosecutor: I am applying for the case to be withdrawn.

Magistrate: Why is that?

Prosecutor: eh an error in the print out... sample deficient.

Magistrate: What is that?

Prosecutor: Let me explain, Your Worship, the breathaliser says the sample was deficient.

Magistrate: But *e kgonne go ntsha printoute jang e le defficiente?*

(But how did it manage to give out the print out if it was deficient?)

Prosecutor: It said the sample was not above 1000ml... that's how the machine works.

Magistrate: Stand up accused.

Accused: (stands up)

Magistrate: *Ba re ba ne ba go akela*. So you will be discharged.

(They say they were lying about you). (Note that the use of strong terms like lying is not unusual in courtroom discourse. Lawyers use them all the time)

In this instance the magistrate addresses both the prosecutor and the litigant in a code-switching mode. The purpose for the switching seems to be rather in favour of the Tswana speaking defendant, a way of empowering the litigant while rather castigating the prosecutor who, though he is addressed in Setswana, is not expected to respond in the language. Here the magistrate is seen to be rather identifying with the defendant against whom the charge is withdrawn and whom he discharges, while he is expressing impatience with prosecutors who do not do adequate preparation of their cases.

In another instance of code switching by the same magistrate, he is addressing the witness. He asks him a question in English and then asks another, clarifying what he is asking for:

Magistrate: Where do you stay? (The witness hesitates to answer the question and the magistrate follows on by asking the same question in Setswana, not exactly the same question as asked in English but a rephrase meant to clarify the meaning of the question.) *O tsoga kae ha re bua jaana?*

(In translation this means 'Where have you woken up from as we are speaking?' (A question usually asked in the population census and whose meaning most Batswana, normally meaning that where you slept is where you stay, very well know)

After the witness answers the question, the magistrate continues in Setswana.

'Mm, tswelela. (Yes, continue) The witness asks whether he can speak in Setswana and the Magistrate answers, *'Yes, bua ka Setswana Rra.'* (Speak in Setswana, sir.)

The transcript from which this excerpt comes from features the speech of a self-defending, accused person under sworn evidence. He speaks a mixture of Setswana and English and the magistrate finds no problem with this.

Accused: I C. K. M. do hereby swear that the evidence I shall give shall be the truth the whole truth and nothing but the truth. So help me God.

Magistrate: You have stated two place where do you stay?

Accused: Hesitation

Magistrate: *O tsoga kae ha re bua jaana?*

(Where have you woken up as we speak?)

Accused: In Gaborone I stay at Gaborone Village.

Magistrate: *Ee, tswella.* (Ye go on)

Accused. Can I speak in Setswana

Magistrate: Yes sir *bua Setswana rra.* (Speak Setswana sir.)

This magistrate's code switching seems to be a statement about the place of English in the courtroom. English occupies a purely utilitarian place. It is not sacrosanct, although having the language of the court being officially only one helps a great deal in this multilingual speech community context.

It is apparent here that the magistrate speaks two languages and code switches them purposefully. He realises that the litigant speaks some English but probably not proficiently enough to sustain an English only speech mode. So he encourages him to speak the language he is really more proficient in by using it himself. It is here that one can evoke Myers-Scottons' indexical

function of code switching, that is code switching functioning to indicate role relationships. The magistrate reduces the social distance created by the hierarchical power relations of the courtroom. This interpretation of the social function of code switching can be justified with reference to this magistrate's other linguistic behavior. There are at least two other instances when he seems to employ other social distance reduction discourse markers. In one case after quizzing the prosecutor about the reason why the police remanded a young defendant in prison, the magistrate addresses the accused person:

Magistrate: Alright, I'll take you in my confidence and grant you bail for one thousand Pula.

And to another he says: Alright, listen carefully to the reading of the facts.

Adjourning one case he complained of tiredness and said,

'I work like a slave. This case will be adjourned to later this afternoon.'

All these remarks mark the magistrate's style. My ethnographic observations are that this style is at least as authoritative as that of the magistrate who never switched to Setswana and even doubly distanced himself by using the interpreter to relay ordinary information such as the setting of the next date of hearings by commanding the interpreter: 'Tell him to come on the eleventh of March.' The less distant magistrate negotiates the setting of the date of the next hearing: 'Alright, how about the 10th of March?' and the prosecutor and defense counsel can indicate if the date is suitable and respectfully acquiesce: 'As it pleases the court.'

8.4.4 A developmental perspective on code switching

Before we lose the trend of code switching as exemplified by this magistrate perhaps we may introduce here the type of code switching, which he may or may not share with the litigants. First we recognise that the magistrate is a bilingual with a high proficiency in both languages, - English and Setswana. So the question may be asked whether there is a difference between the codes switching of different types of bilinguals? This question may be informative and even bring about a different perspective of code switching as I have experienced and indulged in as a bilingual in Setswana and English. The interesting question in this regard would be, 'Are there any stages of development in the language development of bilinguals?' If we go by my intuition as a bilingual, it would seem to me that there are certain periods of the development of the second language in which bilinguals are prone to switching between languages. This does not mean they are necessarily unable to communicate with only one language because it has been experienced by me and by my interlocutors that we do not switch codes in conversation with monolinguals of either language. On the other hand, I have found it difficult not to code switch when I know that my interlocutors will not be unsettled by my speech mode. This happened earlier on in my language development especially at the university level of an English as a second language context. I would sometimes deplore my speech mode but was somehow compelled willy nilly to switch codes. I would ask myself 'don't I know English enough or Setswana enough to have completed that

utterance in only one language?' This wholesale code switching seems to be a stage in bilingual language development. The bilingual compelled to speak in two languages only because he or she knows the languages not out of deliberate planning. This is why observers of code switching have said things like:

The rapidity and automaticity with which such alternations take place may give the impression that the speaker lacks control of the structural systems of the two languages and is mixing them indiscriminately. (Dulay et al 1982)

I can sympathise with this attitude. To someone who knows only one of the languages of the code switcher the rapidity and automaticity of code switching may be unnerving. But to put their minds at rest about this phenomenon, one can point out that automaticity and rapidity of use of any language known by the speaker is a purely natural phenomenon, whether it involves a single language or several languages. If it were not natural it would be very difficult to account for it. As to the question of conscious control one would point out again that it is a rare speaker who plans fully before making an utterance in the language he or she knows. The languages are mixed mainly because they are mixable not because of any conscious decision to use both languages. at least not all the time.

However, all said and done, the kind of code switching that happens with this magistrate is to be seen as deliberate as the institutional context to some extent proscribes it. It is used sparingly and with calculated effect. It is as if the speaker has the maxim that the law was made for man, not man for the

law. This is the synchronic position of the use of different languages in one context, the ongoing state of languages in the specific context. They are sometimes used together, in various ways, by court participants. Below I shall attempt a description of this mixture of languages showing the grammar of the mixed codes, which is mostly at the level of phonology and morphology.

8.4.5 Similarities and differences between the code switching of litigants and that of the magistrate

Linguistically, the code switching of both magistrates and litigants falls into two classes – the syntactical switching and lexical switching. Syntactical switching is of two types. One is the situation where in the turn of one speaker, one sentence is in one language and the next is in a different language, that is, inter-sentential switching. According to Romaine (1989 p. 122) inter-sentential code switching involves a switch at clause and sentence boundaries where each sentence is in one language or the other. It may also occur between speakers turns as in a question made in one language and answered in the other language by the other interlocutor as in the example given in the earlier section of this chapter - ‘Who speaks what language?’ There is also intrasentential switching where a clause exhibits the grammar of two languages. A very informative example comes from the speech of one magistrate:

Magistrate: But *e kgonne go ntsha printoute jang e le difficiente?*

This specimen of language is particularly important as it represents what I may call the community norm of code switching. A lot of the codswitching between Setswana and English is of this type. The utterance begins in English, 'But' and then it is completed in a typical mixture of Setswana with English words phonologically integrated into Setswana phonology. '*E kgonne go ntsha printoute jang, e l e defficiente?*' is the Setswana frame of the grammatical structure. The bold italics represent the phonologically integrated English words. The sentence in English is 'But how could it release the printout if it (the sample of breath) is deficient?' The 'but' at the beginning of the question signals the fact that some of the words will be in English. I will also show how an utterance can be basically Setswana in grammar but contain English words, when I analyse the code switching of litigants. What the code switching of the magistrate shares in common with that of the litigant is the fact of inserting phonologically integrated English words into Setswana sentence frames. The English words are 'Tswanalysed' as the Batswana say of such language. The penultimate syllable of the words 'printoute' and 'defficiente' is constructed in accordance with Setswana phonology. Cole (1955 p.67) in his *Introduction to Tswana Grammar* describes this characteristic of Setswana phonology. He says that '**Stabilizers** are prefixal or suffixal elements which have no intrinsic significance or concordial function, their sole purpose is to provide an additional syllable for words which generally speaking would otherwise be monosyllabic. and thus to accommodate the characteristic penultimate accent.' In this example of Tswanalised English words, the 'e' at the ends of

the words '*printoute*' and '*defficiente*' is accentual, ie it gives the words their Setswana pronunciation. The reason for the use of these Tswana/English words is that it must be clear which elements of the question relate to those in the prior utterance. There is as yet no Setswana terminology for most of computer technological terms, like 'printout' but there is a Setswana equivalent for 'deficient.' So it seems that the use of the Tswana term is triggered by the use of the previous technological term.

As I have pointed out before, the magistrate uses code switching sparingly. But when he does his language is the same as that of any Tswana using English words in Setswana frames, i.e. it follows the community norms for code switching. The following examples come from the code switching of one lady witness.

Excerpt 1 Tape no. 8 Case no. 23 15-08-99

Prosecutor: Did you have the chance to see the registration number?

Witness: *Ga ke ise ke bone chancee ya go bona registration number ka ke ne ke shokegile.* (I did not get the chance to see the registration number because I was shocked.)

Excerpt 2 Tape no. 8 case no. 23 15-08-99

Prosecutor: Can you tell this court what could have caused the accident?

Witness: *Accidente e kane e causitse ke gore rre erile ha a etc.* (The accident may have been caused by that this gentleman... etc)

Excerpt 3 Tape 8. case no. 23. 15-08-99

Prosecutor: Yes. And did the police come to the scene of the accident?

Witness: *Ee, mapodisi a ne a tla.* (Yes the police came.)

Prosecutor: And what did they do?

Witness: *Ba ne ba measura dikoloi ba bo ba re tseela ko police station.* (They measured the cars and then took us to the police station.)

Prosecutor: And what happened at the police station?

Witness: *Ko police statione ba ne ba tsaya statemente ba be ba mpollelela gore ba nkhipisa tame ke be ke ba bolelela gore ga ke minde go hupa tame*

ka gore ga ke a nwa bojalwa. (At they police station they took the statement and told me that they would breath- test me. I told them that I don't mind being breathe tested as I had not consumed any alcoholic drink.)

The kind of code switching exemplified by these excerpts from this speaker is that of lexical insertion. With English words being inserted into Setswana grammatical frames with phonological and/or morphological integration.

Examples:

1. *Gake ise ke bone chanse* The English word 'chance' is pronounced with a Setswana accent which adds the stabilizer, 'e' to the the English syllable 's'
2. *Ke ne ke shokegile.* The English adjective 'shocked' is integrated into Setswana morphology with the addition of the Seswana inflection for the past tense '~ile~'
3. *Accidente e kane e caucasitswe ke gore...* The English noun 'accident' is pronounced with a Setswana accent with the stabiizer 'e.'added to the voiceless plosive 't,' and the English verb, 'caused' is morphologically integrated by the replacement of the English past tense morpheme with the Setswana past tense morpheme '~itswe~'
4. *Ba ne ba measura dikoloi.* The English verb 'measured' is both phonologically and morphologically integrated. The Setswana past tense morpheme ~ne~ replaces the English past tense inflection '~ed~'(note that the Setswana morpheme is not part of the verb, ie. It is not an inflection but a freestanding morpheme. With this kind of past tense creation, the English verb 'measure' is then only phonologically integrated with the stabilizer 'a', which added to a word ending with the voiced sibilant 'djz.'

5. *Ko police statione be ne ba feta ba tsaya statement ke be ke ba bolelela gore ga ke minde do hupa tame...* (at the police station they took down the statement ...and I told them that I don't mind being breath tested as I have not...) The English expression 'don't mind' becomes the Setswana '*ga ke minde.*'

The last example 'statement' and 'don't mind' are the only instance of lexical insertion that is necessitated by a lack of a parallel concept or word in Setswana. All the other insertions are not caused by any absence of a Setswana word. The word for 'accident' in Setswana is 'kotsi,' and the word for 'chance' in Setswana is 'sebaka,' and the word for 'shocked' is 'tshogile thata', 'caused' is 'dirilwe' and 'measure' is 'meta.'

The explanation for this switching of codes on the part of this ordinary Motswana woman may be that she knows the words in English but does not have enough grammar of English to construct the sentences fully in English. So she is using Setswana syntax with English vocabulary. This is allowed in any ordinary bilingual context. So she brings into the courtroom the community's norms for bilingual interaction. This is particularly interesting if compared to the language of other court participants like the clerk of court for example. He or she is the only person who has to speak Setswana but he never code switches except for saying the time and dates in English, for example when he interprets the times set for trial to the litigants. In other words interpreting is a conscious use of languages and the clerk-cum-

interpreter knows that the court context is a formal one determining the suitability or otherwise of code switching.

So far I have discussed three types of code switching in this courtroom. The first is the language preference switching which produces different languages in consecutive turns (Romaine 1989, Li Wei 1994). The second is syntactical switching including intersentential switching where one sentence by the same speaker is in one language and the next is in a different language. The third type of switching is intrasentential (Muysken 1987 p.118. Romaine 1989 p. 122, Milroy and Muysken 1995 p. 7, Li Wei 1994 p. 152-153) which, in the Setswana/English code switching, is heavily composed of lexical insertion.

The final type of language alternation in this courtroom is the one in which the witness uses both English and Setswana in answer to different questions at different intervals in the same inter-change with the same counsel.

Excerpt 4 Case no. 2 Supplementary data January 2000

Defense Counsel: I am going to ask you a few questions so that what you've just said to the court is the truth as far as you know. Now you said Thabang was knocked at the zebra crossing did you say it?

Witness: I don't understand the question.

Defense Counsel: Was he knocked at the zebra crossing or not?

Interpreter: *A o utlwile sentle? O ne a le fa zebra crossing?* (Have you heard properly? Was he at the zebra crossing?)

Witness: *O ne le...* (inaudible) (He was... inaudible)

Defense Counsel: Was Thabang at the zebra crossing or not?

Witness: (Silence)

Defence Counsel: Yes or no, was he knocked at the zebra crossing or was he not knocked at the zebra crossing?

Witness: I didn't see.

In this excerpt we see the witness answer first in English, 'I don't understand the question.' She then waits for interpretation, 'A o utwile sentle?' (Have you heard properly?) then answers in Setswana. Finally, without requiring interpretation of the last question in this excerpt, she answers in English. This is different from the other woman who responded consistently in Setswana to questions put to her in English by the prosecutor.

This is a much more complex alternation of languages characterised by a witness who speaks both languages at different turns. Sometimes she needs interpretation and sometimes not. Some times she responds to English in English. This bilingual has not decided what language she will speak in but jumps from one language to another. Interestingly enough, this mode causes no concern to anybody in the courtroom, in other words, there is no communication breakdown because all court officials, comprising the magistrate, counsel, prosecutors and the court clerk, understand the two languages and it does not matter at all which is being used at a particular juncture in the proceedings when it involves those who are not constitutionally constrained to speak the language of the court – English.

8.4.6 Some cross tabulation

This study of courtroom discourse is largely qualitative in the sense of being based on samples of natural language collected from one courtroom.

However a part of the data came from questionnaires administered to legal

personnel eliciting their opinions on the statuses and uses of languages in the courtroom. The purpose of collecting this data was to find out the members awareness of the language (s) they use in the court. There were two questionnaires, one directed at the police prosecutors and one at lawyers. The decision to separate lawyers from police prosecutors was based the fact that they perform different functions in the courtroom and therefore they may offer different perspectives on the issue of language in the courtroom. Each set of respondents was asked six questions relating to their awareness of the uses of languages in the courtroom. I now discuss the responses and compare them with the analysis of bilingual data just completed. The rational for placing the analysis of the questionnaire data here is that putting them in retrospect allows for some validation of the observations made in the bilingual data analysed.

Question 1 was directed at the police prosecutors and witnesses. How often do people make statements in Setswana? All policemen and women selected the category 'rarely' to this question and one of the policemen explained that it is not 'admissible' to write statements in Setswana. The question did not include the category 'never' because many people are in fact interviewed in Setswana but their responses are written down by the police in English. It would be an informative exercise to actually study this process of interviewing and directly translating into another language. But here the purpose of the question was to establish which language is actually used more. It would appear that police prosecutors or interviewers are also translators operating in two languages all the time. This immediately

translates into the observation that English is the language of official, written documents. The courtroom itself carries this naturally complex interrelation of languages further. The magistrate and other personnel listen to defendant and witnesses speaking Setswana and all make their records in English.

Question 1 to the lawyers was, 'How often do you represent people who do not speak English? Two lawyers answered 'Often' four 'sometimes' and four rarely. This indicates that lawyers are exposed to a more varied clientele than the police but it does also reveal that lawyers operate mostly in English in their day-to-day work. So they translate only the legal genre into everyday language.

Question 2 to the police officers was Are the vernaculars of Botswana like Setswana Ikalanga and others ever used in Court? And question three was a corollary to 2 requesting qualification of the answer to 2. All answered 'yes' and one respondent, who made the explanation in question 1 explained here also that they are used only when the person concerned cannot understand or speak English but they are interpreted into English. In my observation, most witnesses and defendants spoke Setswana more than other languages. What has been revealed, however, is that the uses of these two languages is more complex than the constitution of the magistrates courts stipulates. This is a natural linguistic pragmatics and I feel cannot be dispensed with without creating serious problems for courtroom process. For example, insisting on translation for the court would mean that cases take much longer to process.

Question 2 to the lawyers was 'During court sessions do you ever use a

language other than Setswana? Nine respondents answered No to this question. This is in contrast to the observation of the police that lawyers sometimes address defendants and witnesses in Setswana. My observation was that Lawyers address witnesses in Setswana only rarely, and only when the court clerks interpretation is contested.

Question 4 to the police was whether they would like to see vernaculars used more in court. This question was based on the hypothesis that the police, being of a lower standard of education than the lawyers would have problems with the language clause in the magistrates' courts' constitution. Seven respondents answered 'yes' to this question and three answered 'no.' Those who said 'yes,' however, believed that this would advantage the witnesses who would understand the court and know whether justice was done or not. My own observation is that the police in fact have no problems with this statute. They are the only personnel who use English all the time. This is partly because their everyday discourse is also highly routinised as, for example in direct examinations. Even then, however, they dispense their duties very well in English. Question 5 for lawyers asked them how they responded to interpretation if it does not represent their point exactly, lawyers say they interject and bring this to the attention of the court; some said they offer their own interpretations. Others said they find different ways of asking the same question until the right answer is given and said that sometimes the magistrate assists with the interpretation. Analysis of this court's discourse has shown that the interpreter is never called to interpret Setswana to the court and that when they do interpret to the witness (which can be circumvented as in the case where the witness answered in Setswana

to questions put in English) they are rarely corrected. I believe this is due to the fact that the task of interpreting from English to Setswana is not as difficult for them as it would be if they had to interpret to the court. They are not holders of degrees of education and their spoken English would not be so perfect as they do not have opportunity to speak English much in the Botswana language situation where English is spoken in very few domains outside official communication. The court seems to be satisfied with the level of interpretation of the court clerks and in my observation, as will be discussed in chapter 9, only one young woman interpreter had obvious difficulty in interpreting to Setswana term 'working together in concert,' which both the magistrate and the prosecutor help her with.

Question 5 to the police 'In what ways do you think the use of vernaculars would affect court proceeding?' Those who were positive about the uses of vernaculars in court did not, in my opinion, argue their cases well. Mainly it was that it would benefit the witnesses but it is seen in the data that they would be interpreted to and that it is them who are allowed to switch codes freely. Those who were negative on the issue of use of vernaculars said their use would delay court proceedings and that it would not be easy to find interpreters.

Question 6 to the police 'What are the advantages and disadvantages of using English in the court?'

The following are the advantages:

For purposes of law reporting

Most of the law is easily interpreted in English

People working in the court are well educated to speak English

The more you speak English the more you get used to it.

It is advantageous where parties to court do not speak Setswana including presiding officers. Proceedings are faster recorded because of one language

It is easy to understand the law written in English.

The disadvantages:

Most Batswana don't know English and it is impossible for the to understand the proceedings.

Translation delays court proceedings.

Some lawyers use jargon and sometimes the message does not go across to the intended recipient.

Question 6 to the lawyers was similar, 'What do you think of the rule that English should be the language of the courts?' Positive responses were that due to the fact that the literature, the text books law reports, statutes and other materials in Botswana and in the region are in English, it is easier to address the court in English rather than Setswana or any other language.

Others said that there are legal phrases, terms and concepts that do not have ready word in Setswana and that invariably when the attempts to find Setswana phrases for them result in long, convoluted phrases and sentences.

This should indicate the difficulties that interpreter are faced with.

Negative responses included the fact that the use of English presents serious disadvantages to illiterate and even literate persons involved in court cases, especially the accused persons. They give the example that ‘notions of responsibility, guilt, fault, etc are probably better articulated in one’s first language’ the respondents pointed out, however, that these difficulties are adequately addressed by accurate translation.

Summary

This chapter has touched on a number of notions about the alternation of languages in the courtroom. It has concluded that the language situation is a complex one in which two main languages are used in different processes of the court for example in the evidentiary stages where the litigants are examined by prosecutors or counsel and involve a number of types of code switching being the A1B2 type, syntactic switching and lexical insertion. Other processes in which two language are used are the reading of charge sheets and readings of fact. Theoretical issues raised involve the definition of the Botswana language courtroom as a bilingual situation, which may be contested by legalists (those who believe that there is only one, official language and other languages are involved only through interpretation). The data has shown that interpretation is only one of the ways languages alternate in this courtroom. The next chapter in this thesis deals with this aspect of court proceedings – courtroom interpreting.

CHAPTER 9 COURTROOM INTERPRETING

This chapter on courtroom interpreting will introduce the Botswana context of courtroom interpreting as can be observed from legislation on this issue. It will then go on to a discussion of previous writing on courtroom interpreting and end with the analysis of interpreted process in the courtroom of this study.

9.1 Description of the data: Dialogues and Monologues

The data relating to interpreting comprises three transcripts of direct examinations, two cross-examinations and several charge sheets and readings of facts. The small size of this section of the data is explained by the fact that most cases involved police witnesses and the police, whether acting as prosecutors or witnesses, are the most constrained to speak English in giving testimony. The heavy involvement of police witnesses in this data is due to the type of offences involved. Most are traffic offences in which the police officers who attended the scene of the offence become witnesses for the state. The witnesses are used by the prosecution to give evidence, which usually involved relating the story of what happened at the scene of the offence in question and what steps they took to address the problem. Of the two cross-examinations, one is by defense counsel and one by a defendant representing himself. The latter cross-examination is conducted in Setswana. It turns out to be a very chaotic interchange, which borders on a quarrel. It is one courtroom text which suggests that English is really the language more suited to the adversary legal system of

the Botswana 'non-customary,' magistrates' courts. There is then one prosecutor cross-examining a defense witness.

9.2 Legislation and statutory provision for bilingualism in the courtroom

In the Botswana Magistrates' Court Act Chapter 04:04, the only mention of language in the courtroom is made in Section 5 of the Act stipulating the language to be employed in the court. It reads:

The language to be employed in the court shall be English and the evidence and all records of proceedings in the court shall be in that language.
(2) If any of the parties or witnesses in a proceeding before the court does not understand the English language, the proceedings shall be interpreted from English into the language understood by the parties or witnesses concerned and vice-versa. Provided that in civil proceedings the parties may be called upon by the presiding magistrate to bear part or the whole of the cost of such interpretation where the language understood by the parties is not one of the languages commonly spoken within the area of jurisdiction of the court (Republic of Botswana Magistrates' Courts Act 04:04).

The effect of this statute is to render the courtroom bilingual by recognising the possible existence of other languages within the courtroom. This situation may be compared to with other situations such as those of the United States, Malaysia and Australia. In the United States, legislation goes even further to provide for availability of qualified court interpreters although, as Berk-Seligson (1990) points out, 'in courts located in linguistically homogeneous areas of The United States, the use of interpreter is unheard of.' She points out that 'when the need for an interpreter arises...judges make use of any bilingual available.' In Botswana, as in Malaysia, (Mead 1985), the court clerk doubles as interpreter. When required. I a small survey of lawyers' opinions, in January 1999 in

Botswana showed that lawyers are sometimes unhappy about the lack of linguistic qualification of court clerks, pointing out that they are not really trained for the job. However, one law did intimate that there are plans underway to train court interpreters.

In Australia, Carroll (1995) reported a very low percentage of interpreted proceedings in courts and tribunals, this in spite of the fact of very large numbers of non-English speaking litigants in the courts. He also reports on the statutory provision made for interpreting for non-English speakers in the courts. He says that, 'in most jurisdictions, the common law principles which apply, give the courts the discretion to allow the use of an interpreter' and that 'common law recognises the need to provide the accused a fair trial and accordingly, the need to ensure that what the witness has to say is put before the court as fully and accurately as circumstances permit, especially where the witness is also the accused' (p.68). He reports that 'the Commonwealth Government ...Evidence Bill of 1993, when enacted, will provide all witnesses with the entitlement to give evidence through an interpreter unless they are able to understand and express themselves in English sufficiently to understand questions and give adequate replies.' However Carroll (1995) argues that 'provision for legal entitlement is still patchy in most jurisdictions This is so because, while it might be supposed that the courts and tribunals will provide interpreters when necessary, and that, therefore, there is no need for legislation, the available evidence does not support this supposition' (p.68).

The reluctance of courts (at least in the Australia and US) to make adequate provision for interpreting, however, may have some practical basis. For instance, many believe that interpreting, when it is not absolutely necessary, may unduly slow down court proceedings. Shuy (1986 p.54) points out that ‘the use of language interpreter in the courtroom has been (and in many cases continues to be) a haphazard affair,’ and that ‘in the past interpreters were not appointed by the courts, primarily because their use tended to slow down the trial process.’ Moreover, if the court interpreter is not full trained for the job, this may in fact create other more serious problems (Hale and Gibbons 1999), The Botswana provision is much less controversial as court interpreters are firm members of the court personnel as they are always present in the courts as court clerks.

9.3 Previous writing on courtroom interpreting

9.3.1 The role of the interpreter in the courtroom and problems of interpreting

The first point worthy of note is the fact of the complexity of interpreting in the court context. Hale (1997) reporting from Australia, makes this observation when she proposes that the complexity of courtroom interpreting is a result of the varying ‘world perspectives’ brought into the courtroom by different actors, being professional in the court and lay persons. She argues that the different

world perspectives are 'expressed in the form of disparate discourses.' The interpreter is brought into this already complex situation by the involvement in the courtroom, of a lay person who not only brings in the ordinary 'everyday narrative practices which stand in conflict with the judicial assumptions of what is relevant in legal narrative' but also a different language from that of the courtroom. This language may be doubly removed from that of the court in the sense that it is not shared, at least partly, by the court and the litigant. (As in cases where the litigant speaks the same language as the court but has no access to the genre of the court). So, as Hale (1997 p198) puts it, 'when a client or a witness is from a non-English speaking background, they will present not only a lay person's view of the world but also a culturally different one from that of the host country.' The situation is further complicated by the use of an interpreter who brings in yet another worldview. There exists in the courtroom, therefore, an interdiscursivity that results from the conflict amongst these different worldviews. The interpreter's role is to bridge this language gap and enable mutual comprehension amongst the courtroom participants. He is assumed to be able to do this because 'although he is neither a legal practitioner nor a lay person, he is conversant with both worlds. (Hale 1997 p.198).

The interpreter's role is a difficult one to play for several reasons. Hale and Gibbons (1999) outline and discuss some of these problems. They argue that over and above the difficulties of the translation process, interpreters face several obstacles when working in the courtroom.' The legal world's ignorance of the

complexity of the translation process and the consequent unrealistic demands on the interpreter; the interpreter's ignorance about the language of the courtroom and the law's assumption of relevance (p206), are cited as the common difficulties in courtroom interpretation. The statement of the former judge of the Supreme Court of Australia exemplifies the first problem. He is quoted as saying,

It cannot be over emphasised that the interpreter should interpret every single word that the witness utters, exactly as it is said, whether it makes sense or whether it is obviously nonsense, whether the witness has plainly not heard or whether, if he has heard, has not understood. The interpreter must look upon himself rather as an electric transformer, what is fed into him is to be fed out again duly transformed.

Hale and Gibbons consider this to represent the legal world's ignorance of the translation processes. It is commonsense understanding that literal translation is not necessarily the best or the most correct rendering of concepts from one language to another. Hale(1997b p.198) suggests this in her attempts to demonstrate when and how the interpreter tries to bridge the discursive gap lawyer and lay person by altering the tenor of the original language. in interpretation. She says that when interpreting into English, the interpreter will render a version that resembles the discursive practices of the legal practitioner, and when interpreting into Spanish, they will imitate the practices of the witness. This observation of what the interpreter does is in fact supported by a theory of interpretation developed by Vermeer (1983) cited in Pocchacker (1992), which argues that the discourse must 'first and foremost conform to the standard of *intratextual* coherence, i.e. it must make sense within its language and culture and only in the second place must there be *intertextual* coherence, i.e. some

relation of fidelity to the original (p.213).Padilla and Martin (1999) also subscribe to this theory in their argument that the ‘the interpreter can and should adapt the target language version to the decodifying capacity of the listeners...’ (p.198). They further argue that:

In consecutive interpretation, the interpreter can, to a large extent, reorganise the terms of the statement in a way that will make its message more immediately comprehensible to his audience... he can and, I contend, he must take as much liberty with the original text as necessary to convey to his audience the meaning (Padilla and Martin quoting Namy from Harris 1981 p201).

It is clear from these translation and interpretation theorists and teachers that preserving the meaning of the original meaning of the spoken text in the target language is best done by focusing on the hearer and how he/she will understand the message, not on textual equivalence. So the following discussion of effects of interpretation on evidence is made with this proviso in mind.

9.3.2 Effects of interpretation on evidence

Recent research into courtroom interpreting (Berk-Seligson 1990, Hale 1997 and Hale and Gibbons 1999), has revealed the fact that interpreters do in fact alter various aspects of the ‘courtroom reality’ (Hale and Gibbons 1999). They point out that ‘the strategic use of language for the purpose of persuasion or attack and the importance of language style in witness testimony for the evaluation of credibility, are aspects of courtroom language that most interpreter disregard. This happens when interpreters concentrate on the representation of only the

propositional content and fail to represent the pragmatics of lawyer and courtroom talk.

Hale and Gibbons (1999) have discovered many ways in which interpreters alter the presentation of evidence. One way is what they call 'the disappearing courtroom' (p.209). This is when the interpreter between Spanish and English in the Sydney courtrooms in Australia, frequently delete the courtroom reality by deleting references to the court in the speech of court personnel. They say the court 'literally goes missing when the interpreter leaves out of the interpretation, systematically, the word 'court' from the English source' (p,209). Using data from several courtrooms they establish, statistically, the absence of translation of the word court by many interpreters. They show twelve deletions of references to the court by three different interpreters. The courtroom reality is also not represented in interpretations that leave out phrases like 'can you tell.' When this happens, the fact that the lawyer requires the witness to tell 'his version' of the story rather than the only version of the story, is lost. This is a central concept of litigation as the trial is basically a forum for the litigants to tell their own versions of the 'external reality.' It is for the judge to decide which version is to be upheld, but the interpreter does not make this known to the witness of the defendant. When the interpreter does not interpret to the witness or the defendant the fact of the courtroom culture, I believe it is a problem if lack of awareness of a very important aspect of register, that is, 'field' (Halliday 1985,

89). It is the field of the discourse that supplies the cultural terminology of the court that interpreters seem to be unconscious of.

When Hale and Gibbons show, along with Berk-Seligson (1990), that the courtroom reality is much more likely to be deleted than the secondary reality, that is the plane of the outside world event that gave rise to the court processes, they are in fact pointing to the interpreters' ignorance of the separate plane of the courtroom reality. In other words, there is a lack of fit between the language of the courtroom and everyday discourse processes.

Other changes that Hale and Gibbons' data reveal include tenor changes and changes in question forms introduced by interpreters. Tenor changes involve changes in politeness of statements or questions such as when the interpreter interprets indirect questions as direct questions; changes in references to persons such as the pronoun 'you' and omissions of titles and surnames. These are significant changes because, as Hale and Gibbons put it, 'tenor manifests relations of status and relations of affect,' both of which may be modified by inaccurate translation (p210-211).

However, I consider the lack of involvement of witnesses and defendants in the discourse practices of the court by interpreters who fail to represent faithfully the courtroom reality to the litigants, is potentially less dangerous in general than the reverse, the representation of the witness and defendant to the judge, jury or

magistrate. This is so for various reasons. The first is that the court, especially the jury, who may be made up of laymen in the field of law, is very strongly influenced in their assessment of the credibility of the witness, by externals like their appearance and demeanor as well as their discourse styles. That these exert strong influence on the jury has been proven, for instance by the psychological experiments carried out in the USA by O'Barr and his associates at the Duke Law Project, By Charrow and Charrow (1979) and by Berk-Seligson (1990). They all agree that the way testimony is presented is as important as the facts it contains (Hale 1997 p.201). The results of the Duke Law Project's controlled experiments showed 'very clearly that style variations in witness testimony strongly affect the jury's perception of the witness's credibility.' They revealed that the same content presented in slightly different styles elicited different reactions from the mock jurors about the credibility and personal qualities of the witness' (Hale 1997 p.201).

How does this relate to courtroom interpreting? It does so in two ways, reported by different researchers. One way in which the jury or judge may be influenced in their verdict is in the form of interpretation of question put to witnesses by counsel. Hale and Gibbons (1999) report that research carried out by many researchers has 'demonstrated that the question form, style and wording are of extreme importance in the courtroom' and that 'the form in which a question is put to a witness exerts a strong influence on the quality of the answer' (p.250) and yet interpreters often do not put the question to the witnesses in exactly the

same ways in which it came from examining counsel. Hale and Gibbons argue that this is absolutely necessary as small changes in the wording of the question can result in dramatically different answers.' They cite Loftus (1979 p.90-94) on this point. The second way that the judgement of the jury or the judge may be affected by interpretation is through translation of evidence of the witness itself. Carroll (1995 p.70) argues that there is enough evidence to prove that the role of the interpreter is 'vital in shaping the impression that listeners form of witnesses. He reports that Berk-Seligson (1990) found that the way in which an interpreter translated a witness's evidence could have a marked effect on jurors' perception of the witness.' For example, when the interpreter added politeness markers like 'Sir' or 'Madam,' jurors were likely to perceive the witness as considerably more convincing, competent, intelligent and trustworthy, than those who heard the same witness when politeness markers were taken out' (Carroll 1995 p70).

9.3.2 Educating court interpreters

Given so much negative criticism of present practices in courtroom interpreting by scholars in the field, what is really required of the interpreter? Hale (1997 p.203) makes the suggestion, which she says is borne out by most academics and lawyers involved in research into the role of legal interpreters, that the interpreter should maintain equivalence at all levels, that is, the interpreted version must be as close as possible to the original in content and form, maintaining equivalence of register, style, hesitations and pragmatic features.

They argue that allowing the interpreter to ‘filter the message by omitting hesitations, making the answer more relevant and more coherent and using a different register,’ would either not be fair to the English speaking witness or backfire on the non-English speaker. The idea that the interpreter should maintain equivalence at all levels has been treated with much ambiguity and contradiction by researchers themselves. For example Hale and Gibbons (1999) maintain that to expect the interpreter to act as a ‘conduit, translating word for word or as a robotic device undermines both the complexity of and importance of the task.’

These problems of interpreting in the courtroom can be ameliorated by interpreter education which focuses on the role of the interpreter as ‘not translating word by word but concept by concept, without adding or deleting anything from the original,’ including tone and register (Rigny 1999 p.92).

Considering that this requires knowledge of the cultural contexts of both languages, it is a difficult task which requires language education for interpreters to include extensive and specific education in the court cultures of the languages involved.

To take the problems of courtroom interpreting with the care necessary for the job, interpreters should really be trained for the job. They should be instructed on the ‘importance of language in the courtroom,’ and in general language competence’ (Hale 1997 p203). As Carroll (1995) puts it, ‘In a legal setting, a

competent interpreter need a high level of linguistic and interpreting skills, an understanding of legal procedures and terminology and an awareness of his or her role and ethical responsibilities.’ This suggests a much higher standard of education than interpreters have around the world, including in Botswana where, although the interpreter is also a court clerk attached to the office of the magistrate and may be familiar with court procedure, he or she is not trained in language or interpreting between English and Setswana.

9.4 Analysis of interpreted proceedings in this study

I have indicated how infrequent interpreting between languages, especially English and Setswana, is in the courtroom of this study. This is basically because the sample of people involved in the court cases studied is bilingual to various extents. The fact the most witnesses are police officers who apprehend the alleged offenders are also influential. Another reason for the limited requirement for interpretation between English and Setswana is the bilingual competence of court personnel, that, is magistrates and lawyers. This is the reason that makes it unnecessary for the language of witnesses or defendants to (mostly Setswana) to be interpreted for the court, thus there is no interpreting from Setswana to English at all. This is the empirical situation that may come into conflict with the language clause of the constitution of magistrates’ courts. Respondents to my validation interviews have pointed it out to me, that this situation might not be tenable in other ways than its legality. For instance, when

litigants speak Setswana in giving evidence and different court participants - the magistrate and different counsel - make their notes in English, individually, the fact that there was no single interpretation listened to and to be referred to by these parties may result in queries later on relating to who made the correct interpretation of the litigant's speech. The respondent who points this out is therefore of the opinion that there must be interpretation into English for the record.

The fact that in this study all magistrates and most legal counsel understood Setswana, the language of most litigants, meant that they could monitor the interpretation. Therefore I contend that the fact that in most cases no complaints were registered regarding interpretation means that all parties deemed the interpreter competent. However we shall need to analyse the interpreted proceedings to find out what it is that was interpreted into Setswana for the litigants.

9.4.1 Interpreted administrative processes

In the proceedings there were two kinds of discourse that involve interpretation. There were the monologues of the written-to-be-read charge sheets and facts of the case; and the dialogues of examinations, direct and cross. This section discusses the interpreted readings of charge sheets and readings of facts, as

administrative processes, first, and the interpreted dialogues as substantive processes, last.

9.4.1.1 Two languages in the reading of charge sheets.

There are basically two processes in which the use of languages offers what may be of theoretical interest. This is the reading of charge sheets and Readings of Facts. The charge sheet originates from the prosecution and begins at the police station. There again we find a complex situation where the use of language is concerned. Litigants come to the police station to make statements. When a potential litigant gives the statement, he or she may be allowed to write it him or herself if he is literate, otherwise the police officer will take the statement and write it down. The language of the charge sheet is English. They are brought to court written in this language. What happens in court is another fit of linguistic skill. The charge sheet is read by the clerk of court who is attached to the magistrate's office and doubles as the interpreter in court. The charge sheet must be understood by the defendants, who are going to plead to it, and so it will be read to him or her in his or her language. The interesting thing I have observed is that the court clerk does not make a written translation of the document. He translates it simultaneously as he reads it to the defendant. So, as we saw with listening and speaking in the courtroom examinations where two languages alternate in the turns of different people, here we see reading and speaking in

two languages at the same time. However it must be noted that the charge sheet itself has such a generic structure that is amenable to this kind of bilingual handling. One English charge sheet read in English for a defendant did not understand Setswana read:

You are L.M. You stay at house number--- Machoba --- Gweru. You are unemployed. You are charged with the offence of giving false information to a person employed by the public service contrary to section 131A of the penal code. It is alleged that etc.

Another similarly worded charge sheet read to a Setswana speaking defendant read:

O K.K. O ngwaga di 33. O nna ko house number --- ko --- Gaborone. O bereka ko Roads. O lebisitswe molato wa go utswa ka dikgoka. Nne yare nako ngwe ka di 30 tsa October etc.

Translated the charge sheets reads

You are K.K. You are 33 years old. You stay at house number--- at --- in Gaborone. You work at Roads. You are faced the charge of armed robbery. On the 30 of October etc.

An experienced interpreter does not have to be looking a sheet written in English to produce a Setswana version of the charges. It is for reason of structural simplicity and equivalence that one can be looking at English words and speaking Setswana. However, the not so expert interpreting a particularly complex charge sheet involving several defendants charged within the same

charge sheet did not fare so well and had the magistrate and sometimes the magistrate and the prosecutor together interrupting to correct the translation.

Interpreter: Le lebisitwe molato wa go utswa le badiri oo kgatlhanong le temana ya bo 271 le temana 277 ya Penal Code. E ne yare magareng ga November 1995 le April 1999 ko Old Naledi Industrial Site mo kgaolong ya Boseki mo Gaborone, (hesitation over the words)

Magistrate: Le le ba diri

Interpreter: Le le ba diri mo Furniture Mart le bereka le le maleibara (hesitation over the words)

Magistrate: Le dira mmogo ka maikaelelo.

Interpreter: Le dira mmogo ka maikaelelo a le mange fela L utswa Goldstar video machine (omits the number of video machines taken)

Magistrate: Goldstar video machine tse tharo.

Interpreter: E mma. Goldstar vide machine tse tharo le Panasonic video machine tse pedi le Samsung video machine. Tse tsotlhe di ne dii ja 10585 Pula l 61 Thebe tsa Furniture mart.

(My Translation)

Interpreter: You are facing charges of theft by employees against Section 271 read with section 277 of the Penal Code. Between the months of November 1995 and April 1999 at Old Naledi Industrial Site, in the magisterial jurisdiction of Gaborone, (hesitates over the words)

Magistrate: Being employees

Interpreter: Being employees of Furniture Mart, working as laboures (hesitates over the words)

Magistrate: Acting together in concert.

Interpreter: Acting together in concert, stole Goldstar video machine (omits number of machines stolen.)

Magistrate: Three Goldstar video machines

Interpreter: Yes mam. Three Goldstar video machine and two Panasonic video machines and one Samsung video machine all valued at 10585 and 61 Thebe belonging to furniture Mart.

In this excerpt we see the magistrate interrupt the cour clerk several times to help with translation. The interpretation is of phrases like ‘being employees,’ ‘acting together in concert,’ and strict adherence to the details of the charge like

the number of items stolen. This indicates that simultaneous translation can be difficult for the interpreter where phraseology is particular to the genre of legal English. The interpreter and the magistrate thus jointly translate the charge sheet for the benefit of the defendant. Here the magistrate wants an exact translation of the terms and details of the charge.

The interpreter in this court reads the charge sheet ‘simultaneously as she translates it (see also Hale and Gibbons 1999 p.207 and Niska 1995 p.311). The interpreter easily mimics the formal style of the writing. This is due to the fact that the written source is ritualised and does not involve frequent changes in tenor, mannerism and other interpersonal functions, being basically a narration of events.

9.4.1.2 Two languages in the reading of facts

The reading of facts stage is normally introduced by the prosecutor who, as we have seen, functions administratively in court to introduce each case and inform the court about the stage the proceedings are at. E.g. ‘I appear for the court, Your Worship. The matter is for reading of facts.’ The magistrate then initiates these through dialogue with the defendant aimed at reminding the defendant of the charges against him and his former pleas to them.

Excerpt 1 Case number 16 06-08-99

1. **Magistrate:** You will remember that on the 2nd of this month you pleaded guilty to several counts.
2. **Interpreter:** O gakologelwa gore erile ka di two tsa kgwedi e, one wa ipona molato mo melatong ele mekawana, (You will remember that on the 2nd of this month you pleaded guilty to several counts).
3. **Magistrate:** Driving a car dangerously.
4. **Interpreter:** O ipone molato wa go kgweetsa koloi ka mokgwa oo diphatsa. (You pleaded guilty to driving a car in a dangerous manner).
5. **Magistrate:** Secondly, driving without a Driver's License.
6. **Interpreter:** Wa bobedi go kgweetsa o sens setlankana. (Secondly driving without a license).
7. **Magistrate:** Thirdly, driving without due care as well as driving without a valid driver's license.
8. **Interpreter:** Le wa go kgweetsa o sena kelello. (And also driving without due care).
9. **Magistrate:** You remember you pleaded guilty to these charges?
10. **Interpreter:** O gakologelwa gore o ipone molato? (You remember you pleaded guilty?)
11. **Accused:** Yes
12. **Magistrate:** Do you still plead guilty to the charges?
13. **Interpreter:** Le tsatsi len o ntse o ipona molato? (Do you still plead guilty today?)
14. **Accused:** Yes
15. **Magistrate:** Alright. Listen carefully to the reading of the facts of the case.
16. **Interpreter:** O reetse ka kelello. (Listen carefully)

The interpretation of the magistrate's words to the defendant seems successful here. It is not challenged by the magistrate and, in my view, the additions and omissions he makes to the original text serve only to couch the magistrate's English into accessible Setswana even though he maintains structural equivalence. If we focus on lines three and four, we find the magistrate's ellipsed utterance is given in full in Setswana by the interpreter. This is an addition, which maximises the defendant's comprehension of the utterance. In lines 7 and 8 the interpreter omits the enumerator, thirdly, and replaces it with 'and also.' This also should course no miscomprehension as the Setswana

phrasing is premised on the observation that it is the final charge and therefore it should not matter what number it is. In lines 12 and 13, the interpreter omits the words 'to the charges', as they are easily retrievable from the context. There are these alternating omissions and additions but they are not substantially relevant, as they are mainly ellipses.

Following the magistrate's framing and focusing moves – Alright. Listen carefully to the reading of the facts of the case – the prosecutor and the court clerk/interpreter proceed to share the administrative processes of the reading of the facts and interpreting the reading of facts to the court.

Excerpt 2 case no 16 06-08 99

Prosecutor: In his investigation, Constable X found that the accident was caused by the accused person who was driving a public service motor vehicle B567AAN.

Interpreter: Gatwe X o tswa go tlhotlhomisa ab a bona gore k0otsi e bakilwe ke wena o kgweetsa koloi ya B567AAN ee rwalang sechaba. (Translation: It is said that X investigated and found that the accident was caused by you driving the public service motor vehicle B567 AAN.)

Prosecutor: The said public service motor vehicle was driving from the westward direction to the eastward direction, being followed by other motor vehicles, which were from the east and many other motor vehicles behind B248AAI.

Interpreter: Gatwe yonr koloi ye e rwalang sechaba e, ene e salane morago le B248AAI e eneng e setswe morago ke tse dingwe. (Translation: It is said that the said public service motor vehicle was following B428AAI which was being followed by other vehicles.)

In all the turns of the interpreter we find that the interpreter prefixes his interpretation with the reporting word 'gatwe' – (It is said). This is done consistently with all the interpreting from English into Setswana. In Setswana the word is a marker of the passive voice, which introduces greater formality than if it were left out. The interpreter could say, for instance, 'the prosecutor says' or 'he says' but he uses the passive voice 'It' which removes the sense of the agent of the action. This is in contrast to the possible English translation, which would not use any reporting phrase like 'he says' when interpreting the words of the prosecutor. By using this formalising strategy, I would argue that the interpreter gives the witness a sense of the authority of the court over the proceedings.

Another thing that the interpreter does is to leave out the mode of address from the English turn of the prosecutor. The prosecutor says 'Constable X investigated' and the interpreter says 'X investigated.' I suspect this happens simply because does not know the terms for ranks in police cadre. For this reason the change that this introduces is not linguistically or discursively significant. In the last two turns, however, the interpreter introduces a significant change. He leaves out directions like 'driving from a westward direction to the eastern direction,' and 'driving from the opposite direction.' He the explanation may that the interpreter does not think the witness needs to have these details as they were meant largely for the record by the magistrate. In this way then the interpreter is acting as a 'filter' between the courtroom reality' and the 'external

reality.’ (Hale and Gibbons 1999). In other words, the court/magistrate in his judgement needs to know the exact details like the direction of the motor vehicles but the defendant does not as he already knows them from the incident in which he was involved. He we find that the interpreter does not interpret mechanically but makes decisions about what to represent in the translation. This interpretation that leaves out details that are known by the court but that are needed by the defendant is allowed to pass by both the magistrate and the prosecutor who both understand Setswana and would register their dissatisfaction with the interpretation if they deemed it significant.

We have already seen that interpreting from the charge sheet is a very simple matter as the charge sheet has a very simple generic structure and involves ritualised language. While the readings of facts are also formal, involving narrative and scenic description of the circumstances of the charge, they are slightly more complex and involve less ritualised structure. Therefore as we have seen they involve more complex interlingual interpretation than charge sheets.

9.4.1.3 Interpreted substantive processes: the dialogues of examinations

The examination processes in the courtroom are also loci of interpretation. In the data, interpretation is found to occur in two kinds of situations. The first is the situation where the witness does not speak any English at all. There are few of

these situations because of the type of offender in these data, drawn mainly from traffic offences. In Botswana, people who drive cars are likely to be literate and therefore are likely and do in fact speak some English. The second is the situation where the defendants and witnesses understand English although for the most part they do not choose to speak it in court. Because many of the offenders spoke some English, interpretation was very ad hoc and inconsistent. What happens is that when the prosecutor or the defense counsel initiate the exchange, sometimes the witness hesitates to answer and looks at the interpreter who then interprets the prosecutor's or defense counsel's turn to the witness. Within the same examination described above, the same witness who sought help with the first question, answers immediately the question asked by the prosecutor, thus giving the interpreter no time to chip in and interpret. The following excerpt illustrates this variably interpreting needs.

Excerpt 1 case no. 23 15-09-99

Prosecutor: Do you know the accused person?

Witness: (hesitates)

Interpreter Gatwe a o itse mosekisiwa? (Translation: It is said do you know the accused person?)

Witness: Ee rra ke a mo itse. (Yes sir, I know him).

Prosecutor: Yes. Can you tell this honourable court how you came to know the accused person?

Interpreter O mo itsile jang. (How did you come to know him)?

Accused: (inaudible)

Prosecutor: Where did the accident happen?

Accused: Gone mo Broadhurst fa of hapaanya strata se se tswelang ko... (Translation: Here in Broadhurst when you come to cross the street leading out to...)

The witness's hesitation in the first exchange leads to interpretation, which is sustained for the next exchange. But interpretation is dispensed with in the third exchange.

Excerpt 2 Case no. 2 January 2000

Prosecutor: Would you please tell this court your name?

Interpreter: Maina a gago ke mang. (Translation: What are you names?)

Witness: (inaudible)

Prosecutor: How old are you?

Interpreter: O na le dingwaga dile kae? (Translation: How old are you?)

Witness: Ha ke tshwara sentle di 19. (Translation: If I am getting them correct they are 19).

Prosecutor: Are you employed?

Interpreter: A o a bereka? (Do you have a job?)

Witness: (inaudible)

Prosecutor: Where do you stay?

Interpreter: O nna kae? (Translation: Where do you stay?)

Witness: (inaudible)

Prosecutor: Do you know T. T.

Interpreter: A o itse T. T. ? (Do you know T.T.

Witness: E rra , ke a mo itse. (Yes sir, I know him.

Prosecutor: Please tell this court what happened to T. T. on the 23rd of October 1998.

Witness: (comes in with the whole story in Setswana without waiting for interpretation of the request).

In this excerpt it seems that interpretation is required until the last exchange when again the witness answers the question before it is interpreted. These two excerpts show that in each case the court assumed that the witness required interpretation and proceeded to supply it. Very simple questions like 'How old are you?' and are you Employed are interpreted. But after a few turns the

witnesses begin to dispense with interpretation and answer questions immediately they are asked. Note here too that the witnesses' answers are not interpreted for the court.

In some instances, the witnesses' hesitations are interpreted as their need for interpretation. At other times there is in some turns, a pattern of language alternation, which is as interesting as that of the A1B2 code switching described earlier, (Chapter 8.4.1).

1. **Defense Counsel:** Now you said it was nine o'clock at night?
2. **Witness:** Gone go na le dilighte. (There were street lights)
3. **Defense Counsel:** But you told the court it was around nine o'clock!
4. **Interpreter:** A ker mme ontse o re e n e le ka bo nine!
5. (Translation: But You said it was around nine o'clock!)
6. **Witness:** It was around five o'clock
7. **Defense Counsel:** It was not nine o'clock?
8. **Interpreter:** It was not nine o'clock?
9. **Defense Counsel:** Do you know what time it was?

In this case the interpreter intrudes in the dialogue even though he knows, from lines 1 and 2 that the witness understands English even though she answered in Setswana. The effect of this bilingual usage is to make the court seem very casual about the use of languages in the proceedings (a fact which they may not be aware of). When I mentioned the bilingual nature of the courtroom a magistrate I was talking to seemed surprised. I did not however get the fortune to hear her opinion about this situation of language use as I could not get to interview her due to the time factor. This is much regretted, as the interview

would have allowed me to build in some member validation of many of my interpretations regarding code switching in the courtroom.

Another respondent told me that this kind of bilingual use in the courtroom might be problematised as when it comes to appeals where language may be cited as a significant fact to the outcome of the trial. However this is the empirical situation of natural language use, which may or may not be responsive to prohibitive legislation. And, as it seems to facilitate communication in the courtroom and seems even to solve a possible administrative problem in a multilingual court I would suggest legal endorsement of the natural language phenomenon.

9.4.1.4 Changes in evidence introduced by interpreters in this court.

We saw in the interpretation of readings of facts some tenor changes introduced by the interpreter who let out of the interpretation modes of address like 'Constable X' and changes in formality and politeness phenomena like changing a request for information into a direct question such as when the prosecutor says, 'Can you tell this court how you came to know the accused and the interpreter puts the statement as 'How did you come to know him?' These changes in the tenor of courtroom language are significant because, as Hale and Gibbons point out, 'tenor manifests relations of status and affect.' If interpreting denies the litigant the sense in which the court regards him as, for example, being politely

requested to supply the information the court needs, he may perceive friendly direct examination in a negative light and fail to see that it is a supportive, co-operative exercise.

Finally, a case similar those cited by Hale and Gibbons (1999) is found where phrases such as 'the court' or this honorable court' is deleted from the interpretation. The prosecutor's request 'Can you tell this honorable court how you came to know the accused person ' is interpreted, rather summarily into a direct question ' O mo itsile jang?' (How did you come to know him?' and the defense counsel's statement 'But you just told this court that it was around nine o'clock' is interpreted as 'Akere mme ontse o re ke e ne e le ka bo nine' and not (but you just told this court...) as in the original utterance. This seems to confirm that deletion of courtroom culture as embodied in the English language, is a general occurrence in court interpreting. In the Botswana case, the conception of the court as a special rarefied place exists in traditional dispute resolution culture but it is not utilised by the court interpreter. For instance, it would not have been difficult to translate the above utterances to include reference to the court. They could have been translated into 'A kere mme o ntse of bolelela lekgotla le gore e ne e le ka bo nine?' The underlined words stand for 'this court.' (But you just told this court that it was around nine o'clock. This tendency to exclude or delete courtroom manners is common as indeed Hale and Gibbons claim that Berk-Seligson (1990) 'provide ample evidence that this phenomenon is not limited to our data.' They suggest that this deletion of the

courtroom reality may arise out of the untrained interpreters lack of appreciation of the legal profession's unusual discourse that is rooted in their specific genre. I would also argue that the fact that in courtroom culture and manners counsel and judges refer to each other as 'my learned friend,' and call the court 'honorable' may have a basis in their conception of their profession but interpreters do not seem to share this knowledge and probably do not consider that a passing litigant needs to be conscious of it.

9.5 Conclusion

This section of the thesis, focusing on bilingual discourse, makes several interpretive claims. In chapter 8, my interpretation of the magistrate's code switching in a formal, institutional context where it is unexpected, serves to create a sense of the humanness of the court process, reducing the highly reified discourse of the courtroom to a friendlier, deliberative environment within a language situation where the language of the court is not the language of the majority. I refer to this interpretation as, 'putting a human face on the law,' by bringing it within the grasp of the ordinary, non-English speaking litigant.

As a corollary to this interpretation there is another relating to the language of the litigant. The case found here is not discussed elsewhere in the literature on courtroom bilingualism. This is the situation where the language of the litigant is not translated into English because the court understands this language. This

situation is one that allows for smooth exchanges of information among the parties without the formalising intervention of interpreting. This situation has lead to the kind of code switching in which the prosecutor or counsel asks questions in English and the defendant or witness responds in Setswana. My interpretation is that this is a litigant friendly form of discourse, which the laws of Botswana should endorse rather than proscribe. This suggests a kind of language policy that takes the real life language practices as legitimate because they are natural and communicatively effective. This recommendation fit in well with criticism of society's tendency to 'naturalise discursive practices' that encapsulate unacceptable power asymmetries' (Fairclough 1989, 1992 pp. 91-93). In this case of Botswana, it would be a good development to 'naturalise' empowering linguistic practices.

This chapter describing and discussing courtroom interpreting makes several interpretations of the process. In this discourse we find the kind of language alternation referred to by some theorists of bilingual courtroom discourse as 'language-switching' wherein the interpreter is referred to as a 'language-switcher' (Morris 1997 cited in Niska 1995 p.296). I find this label useful in distinguishing between the two language alternations of code switching and interpreting. Interpreting is utilised in this courtroom in three types of processes – the administrative processes of readings of charge sheets to the defendant and reading of facts to both the court and the defendant, and the substantive processes of examination. I view the reading of the charge sheets as mainly

monologues interpreted simultaneously (also Niska 1995 p.311). Readings of facts are also monologues by they involve consecutive interpreting. I point out that the ease of interpreting these processes is a function of the text types involved. They are as I have pointed out in chapter 5, very simple genres with clear structuring and, as far as charge sheets are concerned, highly ritualised form of language. I distinguished between the more able interpreter and the one who had difficulties. The able interpreter reads very easily translating directly from the English charge sheet to spoken Setswana for the defendant. However, I did point out that the interpreter who had problems reading the charge sheet was faced with a rather more complex charge sheet involving several defendants charges in the same charge sheet and that her problems included phrases such as ‘acting together in concert.’ Otherwise the court clerks seemed to fit the bill well as interpreters for the court and much of their interpreting was not challenged by other members of the court.

In interpreted dialogues a different scenario prevailed. Here, as in the literature, the role of the interpreter is more complex and fraught with difficulties.

Interpreting does affect evidence in ways outlined in the literature such as changing the tenor of the court relations when the interpreter deletes references to the court in requests such as ‘would you tell this court how you came to know the accused person’ and the interpreter simply asks the direct question ‘How did you come to know him?’ Here the reference to the court is deleted and the request is phrased as a direct question, deleting the politeness markers. In this

kind of interpreting the courtroom culture is lost to the litigant who does not get the chance to know how the original question was phrased and, therefore, may fail to appreciate the discourse context of the court. On this point my data corroborates the other researchers' findings and thus renders more generalisable.

The issues in this chapter, along with those raised in other chapters of this thesis are abstracted and consolidated in the next chapter, chapter 10, discussing the tools of analysis in this study and the themes they gave rise to.

SECTION E: DISCUSSION

Chapter 10 Themes: Linguistic analyses and sociological interpretations

The aim of this section of the thesis is to consolidate topics and themes which have emerged from the analyses of the data on the communication processes in the court of law and to integrate them with the methodologies of analysis used in this study. I achieve this aim by relating language to society in the way that the various methodologies I have used make possible. This is why I entitle this section as linguistic analyses and sociological interpretation. So we begin with the methodologies employed in the analysis of the various chapters in this thesis. These methodologies are stated here in their order of appearance in the thesis. Genre and narrative analysis are used for the analysis of the monologues in the courtroom comprising the administrative processes of Mentions, Readings of Facts and the substantive monologues of Submissions and Judgements as well as for analysis of the dialogues of the Readings of Charge Sheets. Discourse analysis is used in the analysis of the dialogues of Examinations. Bilingual language usage is also a characteristic of this courtroom that has been analysed. These analyses have systematically revealed social issues such as social relationships in the courtroom. For example, the IRF model of Sinclair and Coulthard (1975) brings to light the social relationships of participants in the courtroom encounters, especially the power of legal professionals vis a vis layman litigants; and the various bilingual models used reveal issues of empowerment of litigants through language choice.

10.1 Linguistic Analyses

The choices of methodology in this study are not accidental but are firmly based on sociolinguistic tradition. As Van Dijk (1997) in his survey of discourse studies has put it, the sociolinguistic approaches are not 'satisfied with a formal account of discourse structures, but emphasise the necessity to study actual languages in their socially and culturally variable contexts.' This study has elected to follow a sociolinguistic approach to discourse studies from amongst many other approaches. The other approaches to the study of discourse are, to mention a few, ethnomethodology and its focus on everyday conversation with its turn-taking structures; ethnography and its accounts of 'communicative events' or ways of speaking in their cultural contexts; discourse grammar with its focus on 'semantic and functional relations between sentences' (Van Dijk 1997 p.26). This approach also differs from forensic linguistics, which is practically oriented to the role of the linguist in the courtroom, usually as expert witness for the defense. It bears some similarities to Critical Discourse Analysis but is less politically and ideologically oriented. Van Dijk (1997 p. 22) represents CDA scholars as those who 'make their social and political position explicit' and 'take sides and actively participate in order to uncover, demystify or otherwise challenge dominance with their discourse analyses.' They focus on 'relevant social problems' and 'their work is more issue-oriented than theory-oriented.' Van Dijk goes on to explain that 'Critical scholars of discourse do not merely

observe such linkages between language and societal structures, but aim to be *agents of change* and do so in solidarity with those who need such change the most' (p.23). While I do not dispute that discourse analysis can reveal insupportable social structural relations, it is my contention that in legal contexts, if the accused person is guilty as charged, he still needs all the help to state his case clearly, which is why we have lawyers as advocates. On the other hand the plaintiff may actually have been wronged. He or she too is the victim of the social structures that create the possibility of the wrong done to him or to her by the defendant. In other words my approach is not social problem oriented like the CDA approach just described. It is pluralistic as it recognises that many different kinds of people pass through the court process in their lifetimes, not only the disadvantaged. I would argue for a more objective, less strongly affective stance in discourse analysis. Scholars should indeed involve themselves in social issues but their criticism can be constructive and objective and also ethical in the sense of being honest with their sample population, allowing member validation within their analyses of the data to which they have been given access by professional members or other society members. It is possible to be critical without a political agenda. It is also possible for descriptive and explanatory efforts of scholars like linguists and discourse analysts to effect change without militancy (on the part of scholars.)

So I go back to the methodology adopted by this study. It is first of all, discourse analysis in the sociolinguistic tradition. Stubbs (1983 p.7) outlines the relationship of discourse analysis to sociolinguistic theory and shows

how analyses of how conversation works - how talk between people is organised - relate to sociological concepts such as roles. He says that 'sociolinguistics will ultimately have to be based, at least partly, on analyses of how people actually talk to each other in everyday settings, such as streets, pubs, shops, restaurants, buses, trains, schools, doctor's surgeries factories and homes (Stubbs 1983 p.7). Add to this list, courtrooms. With this method, texts are related to their purposes, which are elements of their contexts of situations.

10.1.1 Legal texts and their 'contexts of situation'

In tracing the relationship of legal discourse to its social context, it is useful to encompass the very enabling methodology promulgated by Halliday (especially 1985, 89), relating a text to its context of situation through the construct of register. He says that 'the notion of register proposes a very intimate relationship of text and its context of situation.'(p.38) My subscription to this notion is due to the belief that it enables the statement of the concrete relationship of legal texts to their contexts of situation i.e. a linking of texts of the courtroom genre to the social structure of the courtroom and to the social purposes of their producers. Linkages of texts to purposes are seen, for example, in cross-examination texts, which are linked to the purpose of information gathering by coercive means. The judgement texts and the closing speeches of counsel with their narrative structure are linked to these courtroom members' purposes of persuasion and resolution of conflict. Other texts in the courtroom discourse, such as charge sheets,

mentions and readings of facts can equally well be linked to their social purpose that is largely administrative i.e. enabling the smooth running of the trial process.

In this methodology, texts can be related to their contexts of situation mainly through register analysis. Halliday (1985, 1989) describes the features of context of situation as the three elements of register - field, tenor and mode.

Field of discourse refers to what is happening, to the social action that is taking place. Field is linked to language through the experiential metafunction of language and in courtroom discourse, field is clearly the legal processes of dispute resolution through the processes of establishing the facts and interpreting the facts in the various opposing ways until one interpretation is held up as the correct one in the judgement stage of the trial.

The other feature of situation that can be related to language is that of the tenor of discourse. Tenor maps onto the interpersonal metafunction of language. Tenor refers to who is taking part in the discourse: their statuses and role relationships. The tenor of the courtroom has been seen to be one of asymmetrical power relations, mainly the dominance of members of the legal profession over the lay people in the courtroom but also in the power of the 'court' over the professional participants.

The third feature of the context of situation is the mode of discourse. Mode refers to what part the language is playing - the symbolic organisation of the

text (language); the status that it has (social purpose), and its function in the context including channel, (is it spoken or written or some combination of the two?) and the rhetorical mode (what is being achieved by the text in terms of such categories as persuasive, expository, didactic and so forth) (Halliday 1985, 1989 p. 12).

There are several modes in courtroom discourse. First in terms of channel, we have spoken and written modes as well as written to be spoken modes. Examinations represent spoken modes entirely and judgements are written to be spoken but also end up in the written mode for court reports that form case law. Many other texts are written-to-be-spoken such as the charge sheet, readings of facts and counsel's closing speeches. These modes are what give courtroom discourse its flavour of being formal, semi-formal and partly rehearsed. The rhetorical mode is represented in courtroom discourse by the strongly persuasive languages of counsel throughout the trial culminating in the very characteristic processes of submissions or closing statements.

Halliday (1985,1989) makes the observation that mode is typically reflected in the lexico-grammatical features that are identified as carrying the textual meanings. This element of language came up clearly in the various sections of chapter 6 on the analysis of submissions and judgements (6.5.2.1, and 6.7.1)

10.1.2 Discourse Analysis: The IRF model and power

Another discourse analysis model that has been employed in this study is that of Sinclair and Coulthard (1975). Through the examination of exchange structure, we have been able to reveal the social relationships or 'tenor,' in courtroom discourse. We noted that participants relate to each other in different ways. For example we have seen the co-operative equality of prosecution and the witnesses (especially in these proceedings where they are in fact colleagues, being traffic police). Here the structure of the exchange is a two-part structure with only the two-part, IR structure. We have also seen the skewed power relations between counsel and witnesses in cross-examination. The re-appearance of the Feedback move in the cross-examination signals counsels' condescension toward laymen in the courtroom, treating them to a third move that appears much like the teacher's in the classroom. We have seen that this power stance of advocates in the courtroom originates in their trial manuals. It is a deliberate culture of coercion. Whether courtroom questioning can be effective (for example elicit relevant evidence) without this tendency towards control of the discourse is worth researching. Much research has been conducted on about coercion in the courtroom but none have offered any explanation of this phenomenon. Scholars, at least discourse analysts, do not seem to have asked the question, 'why?' If anyone did we might actually come to a better understanding of the laws of evidence and the education of lawyers.

On the other hand the realisation of power in combativeness such as that found between opposing counsel in their opening and closing speeches has, I think, not received as much attention from discourse analysts as the problem

of coercion in courtroom's fact gathering transactions. One study by Danet and Bogoch (1980) addresses this issue of combativeness in counsel/counsel discourse. We saw in our analysis of closing speeches that lawyers can take combative stances to each other and attack each other verbally in efforts to destroy each other's arguments. The power revealed here is at least as blatant as that applied by counsel to the opposition's witnesses. I have also stated that my belief is that witnesses are prepared for this stressful situation by their counsel (but see also Wodak (1985 p.183) who points out in her description of the mode of discourse in the inquisitorial system in Austrian courts that, 'choices of...text types depend (among other things) on the speakers preparations by their lawyers). Combativeness in the courtroom actually is part of the courtroom culture. Danet and Bogoch (1980 p. 41) in their discussion come to the conclusion that 'to work properly, the adversary model of justice requires attorneys representing each side to be highly combative and, moreover to be evenly matched in combativeness.' Exercise of power is part of lawyers' training in court practice and can be seen in their manuals. This is not to say that cultural or social relational norms like these must be accepted uncritically but rather that they need not be overplayed in the literature to the extent of distorting the picture of another professions genre. Criticism that is not practical will not bring about the *change* so desired by scholars of the critical school discourse analysis as the criticism can be resisted. Critics of legal language sometimes address themselves to the legal profession suggesting to them some adaptations that need to be made in legal language. Other discourse analysts suggest the education of those disadvantaged in their participation in and their relations to institutional

authority (e.g. Kress 1993), as well as the re-education of professional members.

10.1.3 Narrative Analysis

One of the methodologies used in this study is that of analysis of narrative genre. We have seen how narrative is the organising principle of the trial as a whole. The manner of adducing evidence is basically telling the stories of different participants especially the stories relating the events that gave rise to the litigation. Stories are also told in the submissions by counsel, mainly as we have seen, the story of the trial itself - what different witnesses have said - and counsels' opinions about how these stories are to be interpreted and their opinion as to which story is to be upheld, whether the story of the prosecution or that of the defense.

The place of narrative in institutional discourse has received a lot of different interpretations. Many researchers (Mishler, Hyden, Hall, Sarangi and Slembrouck, all in Gunnarson 1997) have produced different views of the role of narrative, Mishler in medical encounters, Hyden and Hall, Sarangi and Slembrouck in Social Work. Mishler's study establish the fact of the joint creation of the story by the medical practitioner and the patient and questions older text-based models of storytelling that assume that the story can be the 'singular possession of the storyteller and not the result of dynamic interactional processes' (Gunnarson et al 1997 p.9 see also Munby'

1993 p. 3). This observation is especially salient to the creation of stories in the courtroom as they are very evidently jointly produced by many tellers.

Hyden's and Hall, Sarangi and Slembrouck's interpretation of the role of storytelling by Social Workers, however impute sinister motives to these 'institutional representatives' and the stories they tell. Hyden's data is the written reports produced in modern bureaucratic institutions by social workers and he makes very strong criticism of these as functioning to 'justify the actions and decisions of the authority and to contribute to the self-understanding of the profession and to the meaning of their work' (Gunnarson p.10) which actions and decisions are said to be made by people who, 'invariably play the role of the good saviour – although they constantly and tragically fail in their mission' and often exclude other 'potential stories.' These are very strong accusations indeed and may be contrasted to legal storytelling, which seems to me to be transparent and open to public criticism, and are continuously being contested by oppositionists. However it has been claimed that legal stories are just as sinister as other 'organisational stories' in their ability to exclude others' stories (see for instance Delgado 1980) who points out that 'Many, but by no means all, who have been telling legal stories are members of what could be loosely described as outgroups, groups whose marginality defines the boundaries of the mainstream, whose voice and perspective – whose consciousness – has been suppressed, devalued, and abnormalised... The dominant group creates its own stories as well. The stories or the narratives told by the ingroup remind it of its identity in relation to the outgroups, and provides it with a form of shared reality in

which its superior position is seen as natural.' (p.241). It seems always the blight of service professions' discourses to come into violent conflict with the commonality of the people and for the critics to equally well to condemn them. But Like Atkinson and Drew (1979 p. vii) I 'do not however propose to take sides in any debate between the critics and supporters of our (adversarial) legal system.

The substantive monologues of the trial in this courtroom involve the court personnel in addressing each other. Here only legal professionals hold the floor and speak to each other, for example, in the submissions stage when counsel address the magistrate and in the judgements when the magistrate addresses the court. The fact that in these parts of the proceedings there is no interpreting for the witnesses or litigants who do not speak the language of the court, underscores the belief here that it is the professionals and not the laymen who are involved. The narratological analyses of these proceedings serve to show the methods by which the professionals talk to each other in their efforts to sway opinion to their side. The main motif I have suggested of these proceedings is that of a battle (of words) between equals which underlies the adversary system of justice. Danet and Bogoch (1980) already referred to in this discussion, see this part of the proceedings in this light when they say that, 'to work properly, the adversary model of justice require attorneys representing each side to be highly combative and, moreover to be evenly matched in combativeness.'(p.41)

In this discussion I have referred to and used various analytic tools of linguistics. I wish now to relate these models to each other and to the themes they have revealed in the course of analysis of the data, in order to answer the question ‘What do Critical Discourse Analysis, Halliday’s context of situation and its related representations in the linguistic system, and Sinclair and Coulthard’s model of exchange structure have in common?’ The answer is that they are all seen to feed into a theory of tenor, that is, social relationships as manifested in language choice and language use as well as how language is used to maintain relationships of equality and inequality. That is, these methodologies enable us to clarify and discuss issues of social concern.

The other methodology used in the study is that analysing bilingual discourse. Here the model used is Grosjean (1982) showing the factors that explain code switching. The code switching of different participants was analysed and the use of two languages in the processes which involve litigants directly - of Readings of Charge Sheets, Readings of facts and Examinations - were described under courtroom interpreting. A number of interpretations of code switching were made including the administrative function of a magistrate in a multilingual context. The themes of empowerment which emerged from analysis of this aspect of language in the courtroom are discussed later in this chapter.

10.2 Sociological interpretations: themes

This study has made a number of interpretations of the social meanings of various discourse patterns. These will now be taken up and discussed in this section as themes.

One of the themes of this study is that of power in the relationships between court participants. But are there any mechanisms of empowerment at all in courtroom discourse? The fact that most scholars have not even suggested these means that they are not obvious and do not attract as much attention as relations observed in courtroom practices such as cross-examinations. It seems to me that a legal system, like for example, the adversary system, could not completely fail to cater for the maintenance of human dignity to the people it serves (unless the laws are themselves inhuman such as the former segregationist laws of The USA and South Africa). It may be true that some rules of evidence such as not allowing witnesses to tell their stories in the ways that they would in ordinary everyday discourse (for example to express their own opinions about what they saw happen as eye witnesses) and the tight control of the discourse by counsel in cross-examination are, ordinarily, objectionable. There is always room for debate in social discourse and while legal members know and understand the motivations of these rules, they do not take the trouble to explain them to others, if they do explain them in their jurisprudential literature.

Empowerment in the legal system

As far as legal provision for human dignity is concerned we can quote one of the chapters of the Criminal Procedure and Evidence Act of Botswana, which states that:

No witness in any criminal proceedings shall, except as provided by this act or any other law, be compelled to answer any question which, if the answer to such a question would in accordance with the law of evidence which was in force on 31st December, 1987, have a tendency to expose him to any pains, penalty, or forfeiture or to criminal charge or to degrade his character. (Criminal Procedure and Evidence Chapter 08:02 Section 258)

One would presume that if a particular defendant were literate in the law this is one clause that he/she could make recourse to in his/her engagement with cross-examining counsel. Otherwise it is the duty of the attorney at law to point this out on behalf of the defendant or witness if the need arises. I have also observed in this courtroom, as has also observed in other courtrooms (Atkinson and Drew 1979) that witnesses do in fact have ways and means of resisting the control of cross-examining (chapter 7.6 in this thesis).

In this courtroom one theme that has emerged is that of **empowerment**. There are three main instances of this empowerment. One is in the language relationships in the courtroom in which witnesses are allowed to speak in their mother tongues and be listened to without the need for interpretation for the court. I see this to be empowering in the sense of witnesses representing themselves without the potentially hazardous intervention of the interpreter as we have seen how the interpreter sometimes filters the courtroom reality and the external reality and interprets selectively. When the court listens to a witness first hand, elements of the situation such as the witness's sincerity

and other mechanisms of creation of credibility such as manner and attitude, are directly observed.

The second instance of litigant empowerment contained in the bilingual nature of the courtroom is the way it deals with disadvantage through lack of linguistic competence either because the language used in the courtroom is not a mother-tongue of some of the litigants, or because the language of law and the court is an unfamiliar dialect to the layman who speaks roughly the same mother-tongue as the professionals in the courtroom. We have noted how in a multilingual setting, the choices of languages can have positive spin-off for the witnesses. The bilingual interaction in the Botswana courtroom is not in general terms unique. But the appearance the A1B2 code switching (where speaker A uses language 1 and speaker B responds in language 2) in formal settings such as the courtroom has not, to my awareness, been described elsewhere. In this context the possibility of a litigant using his or her own mother-tongue in response to a second language he or she understands seems an advantage to the litigant. In the description of alternation of languages in this courtroom I have indicated that in interpreted proceedings, the litigants have, seemingly randomly, required interpretation only at certain places in the same interaction with the same lawyer or prosecutor examining and not at others. The total effect of this seemingly chaotic use of languages is facilitation of communication rather than communication breakdown. It seems to me a positive aspect that is beneficial to the not so highly educated litigant. It is my opinion that if, as some respondents have stated, this is not satisfactory state of affairs in terms of not

being legal, then it is the legislation which must accommodate the pragmatic situation. This recommendation is not unheard of in law. This is the proper place for the operation of the law of administration that stipulates that if the law cannot curb, then lawlessness becomes the law. I am suggesting that this state of bilingualism in the magistrate's court in Botswana should be endorsed as the most effective way of carrying out an administration of justice that takes into account the needs of its clients.

The third empowering feature of the trial is one that attaches to the administrative position of the magistrate. Empowerment of the litigant occurs when the magistrate takes the trouble to find out the status and situation of the accused person awaiting trial by asking the accused if he has anything to say to the court at two junctures in the trial process. One juncture where the accused person is so involved is in the preparatory stage of the proceedings i.e. at the mentions stage. At this stage the magistrates ask defendants whether they have anything to say. This opportunity to speak has been used by defendants to state their complaints about their conditions in prison and other explanations of issues. The magistrate often assures the accused that his problems will be attended to. The same question is asked by the magistrate towards the end of the trial when the defendants are asked whether they have anything to say in mitigation before sentencing. The belief is that the mitigating circumstances of the defendant are taken into account in the magistrates' decisions.

In relation to the question of legal members power over laymen in the court I would argue that a legal system should put in place checks and balances to govern the activities of its members. I cannot say for certain, as I am not a lawyer, whether the rules of evidence, which govern what is and is not admissible as evidence also control lawyers strategies in court. It seems to me that the assertion by Candlin (1997 p. xii) that 'Of course and inherently so, the practices of the profession cannot be de-institutionalised, one always empowers or disempowers by what one does and how one acts,' is particularly apt in this situation of relationships between professionals and layman clients.

Another theme is that of **conformity with the law** as seen, for example, in the strict adherence of the prosecuting officers to the language clause of the Magistrate's Courts Act. From interviews with the police prosecutors, it became clear that they are very conscious of the fact that the language of the courts is English and they believe that languages brought into the court by litigants are only accommodated through their interpretation into English. In fact this perception is not in accord with the observed uses and interrelations of languages in this courtroom. We have seen code switching of the various types described under the bilingualism chapter in this study (Chapter 8) and the fact that the language of the litigants, if it is Setswana, is not normally interpreted into English for the court. The explanation for this conformity of the prosecutors, who are police officers, has been given, in this study, as the fact that as law enforcing agents, they are careful not to be seen to be contravening the law themselves and as has also been pointed out, there is an

observable tendency on the part of magistrates to enjoin the prosecutors to speak in English. It seems to me that prosecution is so pivotal to legal proceedings, (if there was no prosecution there would be no cases) that conformity with the law at this particular point of the proceedings gives a feel that all of the proceedings are in fact strictly conducted in English.

Magistrates are not conscious of the fact that, in practice, Setswana is another language of the courtroom (in the sense that Setswana is not translated into English for the court).

A theme related to this one of conformity with the law is that of **the enabling function of routine in everyday work situations**. The work situation of the courtroom exhibits this tendency to routinisation of activity. When the routine is disturbed, as we saw in the case of the witness who said he did not know the accused person, (in the analysis of a direct examination by a prosecutor), it becomes very clear that sense making in everyday work depends on routinisation. The daily work of the prosecutor, in mentions and direct examinations exhibit a high level of routinised language, for example, the self-introductions of the prosecutor, 'I appear for the state Your Worship,' and the informing moves, 'The case is for mention, to set the date for trial' (routinely repeated at the beginning of each case). This element of routine language is also seen in the opening moves of direct examinations, 'Do you know the accused person?' Can you please tell this honourable court how you came to know the accused person?' Routinised language is a greatly enabling part of the 'meaning potential' that is the language system.

It is this, which makes the prosecutor function comfortably in the English language he is obliged by the law to use in court.

The themes of **Co-operation and coercion** are also strongly suggested by the data of this courtroom. As Atkinson and Drew (1975) point out, in examination there are two distinct dialogic models – co-operative and supportive in direct examination and combative and adversarial in cross-examination (p.105). In the direct examination of own side's witnesses the prosecutor and the witness engage in a co-operative transaction of building up the story of their litigation in ways that give advantage to their side. Here there is equality between the prosecutor and the witness even though the prosecutor, who is a member of the 'powerful legal profession,' controls the discourse by way of taking the initiating moves. In cross-examination of the same prosecution witness we see a completely different kind of relationship, that of blatant control of the discourse and the linguistic moves of the witness by the attorney for the defense. The attorney for the defense does not only ask questions, he coerces the answers he requires of the witness, often by forceful repetitions of the same question.

The theme of **identity**, through participant roles, comes out of the data in three places. There is the identity of the magistrate, the identity of the litigant and the identity of legal counsel and prosecutors. We saw in the bilingualism chapter of this thesis how the magistrate can take the liberty to put a human face on the law by speaking the language of the litigant, (but only briefly) as he soon reverts to English, the language of the court, in a way that distances

him from the non-English speaking litigant. When the magistrate makes it known to the litigant that he understands his language this serves to raise his social status without in anyway reducing the status and authority of the magistrate. We have seen how the magistrate is still held in high esteem and his administrative decisions are deferred to by others in the courtroom. One recalcitrant defendant, accused of rape and assault, completely ignored (or was ignorant of) the rarefied atmosphere of the court. He complained incessantly and overlapped his speech with that of the magistrate. He went out of the courtroom, after the date of trial had been set, complaining volubly. I do not believe he will get a light sentence if found guilty as charged (unless his lawyer can plead insanity).

Magistrates do often assert their authority over other officers like defence counsel and prosecutors. They can upbraid officers for lack of preparedness for their cases as we saw when he spoke in a friendly manner to the accused by switching to Setswana to tell him 'Ba re ba ne ba go akela,' meaning 'They (the prosecutor police) say they were lying about you.' Another magistrate, (a woman) enjoined the prosecutor to 'make sure that your clients are properly dressed when they come to this court' and told another defendant to button-up his shirt. Magistrates give commands like 'report to this court on the 27th of September.'

The litigant's identity is also positively provided for in their use their mother tongues. When a litigant is listened to in the language he or she speaks without the requirement to interpret his or her speech into English, he or she

identifies better with the often very unfamiliar context of the whole courtroom – physical and social.

As far as counsel are concerned, their identity is associated with power throughout the trial; whether it is in their relationship with the litigants in cross-examinations, or their relationship to each other and to their audience, the magistrate, in their closing speeches. We have seen how the power stances that counsel take in the courtroom are a part of their culture, which is built up for them in court practitioners manuals. In submissions we see open combat between opposing counsel in their attempts to damage each others cases and persuade the magistrates to see the cases their way. It is in this most characteristic of courtroom processes that we see the tug of war between people who are equal in combativeness. Their speeches are full of hyperbole, derision and sarcasm towards each other (described in this thesis at chapter 6.5.2.1: linguistic features of submissions).

But it is the ways that this discourse community accommodates outsiders, that is, laymen in the courtroom, that has been discussed so much and with much criticism by the academics, themselves a discourse community.

Perhaps the best explanation of this discursal phenomenon is that given by O'Barr (1982 p.401) when he explains the relationship of the legal profession to the layman as the client of the law. He stated:

Given the importance of preserving modes of expression in systems which are based on precedence, one of the most important roles which the lawyer thus provides for his client is that of interpreter. He is the channel of access to the law; he is the 'bilingual' who can act as interpreter between the

language of his client and the language of the law. This happens in effect when the client approaches the lawyer. They begin talking about the problem which has brought them together: the next step in the legal process is for the lawyer to translate the problem originally expressed in everyday code into legal concepts and to attempt to interpret what is happening to the their client.

Here the identities of the legal professional and the layman are shaped by knowledge distribution between them. When litigants enter the courtroom they are entering the world of professionals and the lawyers continue to represent the client in the 'arcane' (Maley 1994) world.

10.3 Conclusion

It seems to be the blight of all service professions that they will come into conflict with the everyday discursive practices of their clients. How this conflict is to be resolved is a matter for theorising. The highly polemical approach of CDA school such as the type described by Van Dijk earlier on in this discussion must, in this era of post-structuralism and the collapse of the communist block, take into account that no one really stands outside of some ideology or other and therefore needs the circumspection suggested by Witten (1993) who argues that 'the challenge of post –structuralism suggests that critical theory will survive in a much attenuated state if indeed at all' and that 'others maintain that it is still possible to maintain some of the goals of critical theory scaled down to an appropriate scope.' We need, I think, a comprehensive approach that will bring together the discourses or genres of professions, like law, medicine and governmental bureaucracy, to name a few, and sketch out their similarities and dissimilarities and then suggest the

way forward towards solving the social problems that arise from the conflict between specialist discourses and everyday discourse.

10.4 Summary of the thesis

Finally, in this discussion I want, in summary, to make some final comments on the research questions of this study. The body of this thesis answers the three research questions that guide this research into courtroom communication. The first question was ‘How is the process of communication facilitated by the use of English in the law court?’ This question is answered by two methods of data collection being a questionnaire and interview study, and analysis and description of the transcripts of the proceedings showing what actually takes place in the courtroom. The questionnaire study addresses this question by asking the views of courtroom participant, lawyers and police prosecutors, their opinions about the use of languages in the courtroom. All policemen answered ‘Yes’ to the question ‘Are vernaculars of Botswana ever used in court?’ One respondent explained that they are only used if the person concerned cannot speak English, but they are interpreted into English. Analysis of courtroom proceedings contradicted this belief. There is no interpretation from Setswana into English as the courtroom personnel understand Setswana and have not, during the period of data collection for this thesis, requested any interpretation of Setswana into English. The questionnaire study also revealed that presiding officers in court sometimes use Setswana but that prosecutors never use any other language but English. This was borne out by

analysis of the proceedings of this court. However, it must be qualified that, by and large, magistrates use only English in carrying out their administrative duties. So it seems that English is facilitative of communication in the courtroom largely in the processes where the court is speaking to itself such as during trial preparations of the mentions and in lawyers' submissions and judgements and in the making of the records of proceedings by magistrates. But examinations and other processes that involve the litigant in the comprehension of the proceedings (such as listening to the readings of facts) and in talking (such as pleading to the charges), are carried out in two languages.

The second question as to how the existence of other languages is addressed by the court, we have seen that they are allowed not only through interpretation but also in other more complex ways that are natural and not premeditated. Having brought this fact to the fore it remains to be seen how the law reacts to such a pattern of language use.

The final question 'What social issues underpin the uses of language in the courtroom?' has been seen to be answered by the analyses and the discussion chapter. We have looked at the use of language in the courtroom in examinations and seen how legal personnel use language in ways that are sometimes coercive of witnesses and sometimes co-operative, depending on the type of examination, whether it is direct examination of own witnesses or cross-examination witnesses of the opposing side and how they relate to each other (through language) as professionals.

Chapter 11: CONCLUSION AND IMPLICATIONS

11.1 Achievements and limitations of the study

Let me start this chapter by recounting what the study has been able to do and what it has not done. I have in this study used discourse analysis methodology and made interpretations of the data that these methods have made possible. If we start with the interpretations themselves, it is probably obvious that these have not managed to be based on a wide enough range of data i.e. data from different sources such as observations, questionnaires and interviews, allowing intricate triangulation. The richest source of data was the transcriptions of the proceedings of the court exemplifying all the processes described. For the chapter on the bilingual nature of the courtroom (a label which may be contestable and which I have therefore taken pains to establish as a pragmatic fact of a court whose wider linguistic context is multilingual) has been also cross referenced with questionnaire data involving the opinions of participants about the uses of languages in this courtroom. Given the newness of the revelations of this study about bilingualism in the Botswana courtroom, there is need for study of more courtrooms to delimit the full nature of this aspect of the courtroom, for instance how widespread or general it is. I believe such a study would be useful for legislation regarding the language of the courtroom in Botswana, if not just interesting as an academic exercise.

Other interpretations are validated by corroboration with the literature such as the possible interpretations of the meaning of the Feedback move in

defense counsel examinations when it is absent from prosecution direct examinations. This has been used in the literature to support a theory of the coercive nature of courtroom questioning. I have used the IRF analysis to argue that there are different types of power relations in the courtroom.

11.2 Some highlights of the study

This study has highlighted a number of important points about communication in this courtroom. The first is the generic structure that the processes in this courtroom shares with similar genres in other parts of the world. The processes of examinations, submissions of counsel and judicial decisions or judgements are described as common genres of the adversarial trial systems. As Niska (1995) points out, 'in highly ritualised legal proceedings, the discourse types are very standardized. She also cites Johnsson (1988 p.30-31) as identifying the main parts of the proceedings of a criminal case as 1. the reading of the charge sheet, 2. the case for the prosecution, 3. the examination and cross-examinations and 4. the concluding speeches. She also, as I have quite independently done in this study, observes two types of processes as monologues and dialogues. I have in this study labelled the main parts of the trial, substantive genres, and the others that are found in this courtroom as its administrative genres. These are mentions and readings of facts. I have also pointed out that mentions in this courtroom are made as preparatory stages of the trial whereas in Britain, for

example, this processes is done in a separate court from the court doing the substantive processes of the trial.

The second important point I have highlighted is that to do with layman understanding of the trial proceedings. This is an important element if we are concerned with the success of communication. Many researchers have made this point a part of their scholarly concern, whether they are studying courtroom communication in a monolingual context for example O'Barr (1980) or bilingual contexts Berk-Seligson (1989) and Mead (1985). Niska (1995) cites Johnsson (1988)'s very interesting example of litigants' comprehension of court proceedings. He said that in his interviews of defendants after trial, some stated that they had no difficulty in understanding the language of the court 'except when the jurists were talking to each other' (p.311). They were referring here to the monological parts of the proceedings. Interestingly in my distinguishing between the administrative monologues of mentions and the substantive monologues of submissions and judgements, on the one hand, and dialogues involving defendants and witnesses on the other, I have pointed out that the monologues involve the court speaking amongst themselves and therefore there is no interpreting of these proceedings for the defendants and witnesses. Researchers like Berk-Seligson concerned with the plight of the non-English speaking defendants do not distinguish between processes that only the legal profession would fully comprehend, including their speeches to each other, and whether these too need to be interpreted to the litigants and how this would affect the proceedings. It has been pointed out that interpreting in the court context is

not very popular. So the question of interpreting even the monologues where the argument is between counsel themselves as in their submission, and the speeches are directed at the court, such as the reading of the judgement would, I presume, be even more problematic.

Another point I have highlighted is the critical discourse analysis position. The last twenty years, since Di Pietro (1982), *Linguistics and The Professions* on to Gunnarson (1997) *The construction of Professional Discourse*, have seen a proliferation of studies of the discourses of various professions. Many studies such as those focussing on Doctor/Patient interviews, the narratives of Psychotherapy and of Social Workers, courtroom discourse and the languages of bureaucracy, are very highly critical of the ways these service professions use languages in ways that mystify the general public whom they serve. Some like Fairclough suggest the roots of these communication problems are the desire by the dominant classes to keep the masses in subjugation and to naturalise power asymmetries. I believe we need a theory of professional discourse that makes use of evidence from all these studies of the languages of the professions to build a framework for understanding problems of communication between the professions and the layman (discourse analysis and academic language included) to provide a forum for understanding other people's genres.

Bibliography

- Appel, R. and P. Muysken 1987. *Language Contact and Bilingualism*. London. New York. Sydney. Arnold.
- Atkinson, J.M. and P. Drew 1979. *Order in Court: The Organisation of Verbal Interaction in Judicial Settings*. London. Macmillan Press
- Auer, P. 1984. *Bilingual Conversation*. Amsterdam. Benjamin.
- Auer, P. 1995. 'The Pragmatics of code-switching: a sequential
In Milroy, L. and P. Muysken. *One Speaker, Two Languages: Cross-disciplinary Perspectives on Code-Switching*. Cambridge. Cambridge University Press. (pp.115-135).
- Auer P. 1998. *Code_Switching in Conversation: Language Interaction and Identity*. London. Routledge.
- Bargiela_Chiappini, F. and S. Harris. (eds) 1997. *The Language of Business*. Edinburgh. Edinburgh University Press.
- Beardsmore, H.B. 1986 *Bilingualism: Basic Principles*. Clevedon. Multilingual Matters Ltd.
- Bennet, W.L. and M.S. Fieldman. 1981. *Reconstructing Reality in the Courtroom*. London and New York. Tavistock Publications.
- Berk-Seligson 1990. *The Bilingual Courtroom*. Chicago. London. University of Chicago Press.
- Berry, M. 'Systemic Linguistical Discourse Analysis: A multi-layered

Approach to Exchange Structure.' In Coulthard, M. and M. Montgomery. (eds) *Studies in Discourse Analysis*. London and New York. Routledge.

Bhatia, V.J. *Language of the Law*. Language Teaching. Vol. 20 Issue No 4 P.227-233.

-1993. *Analysing Genre: Language in Professional Settings*. London and New York. Longman.

Bloor, M. 1998. 'English for Specific Purposes: The Preservation of a Species. [some notes on a recently evolved species and The contribution of John Swales to its preservation and Protection.]' The American University. Pergamon. Elservier.

Boje,D.M. 1991 'The storytelling Organisation: A study of story Performance in and office supply firm.' *Administrative Quarterly*. Vol36 No. 1 March 1991. (pp. 106-124)

Brooks, P. and P. Gerwitz1996. *Law's Stories: Narrative and Rhetoric in the Law*. New Haven. London. Yale University Press.

Buckle, S.R. and L.G. Buckle. 1977. *Bargaining for Justice*. New York. London. Praeger Publishers.

Bulow-Moller, A.M. 1991 'Trial Evidence: Overt and Covert Communication Court. *International Journal of Applied Linguistics*. Vol 1 No.1 1991.

Burgoon, M. and E.P. Bettinghaus.1980. 'Persuasive Messages' in Roloff, M.E. and G.R. Miller (eds) *Persuasion: New Directions in Theory and Practice*. Beverly Hill. London. SAGE Publications. (141-169).

Burton,D. 1981. 'Analysing Spoken Discourse' in Coulthard M. and M. Montgomery. *Studies in Discourse Analysis*. London and New York. Routledge.

Candlin, C.N. 1997 'General Editors Preface to Gunnarson, B. et al. *The Construction of Professional Discourse*. London.

New York. Longman.

Carroll, J. 1997. 'The use of interpreters in court' in *Forensic Linguistics. The Journal of Speech, Language and the Law* Vol. 4 No2. 1997.

Carlen, P. 1976. *Magistrate's Justice*. London. Martin Robertson.

Christie, F. and J. R. Martin 1997. *Genre and Institutions: Social Processes in the Workplace and School*. London and Washington. Cassell.

Clegg, R. 1993. 'Narrative, Power and Social Theory' in Munby D.K. *Narrative and Social Control: Critical Perspectives*. Newbury Park. London. New Delhi. SADE Publications.

Cole, D. T. 1955. *An Introduction to Tswana Grammar*. Cape Town. Longman.

Cortazzi, M. 1993. *Narrative Analysis*. London. Washington. The Falmer Press.

-1994. Narrative Analysis. A State of the Art Article. *Language Teaching*. Vol 27. 157-170.

Coulthard, M. 1981. 'Developing a Description in Spoken Discourse' in Coulthard, M. and M. Montgomery (eds) *Studies in Discourse Analysis*. London. New York. Routledge. (pp.1-50)

- 1992 (ed) *Advances in Spoken Discourse Analysis*. London and New York. Routledge.

- 1996 'The official version: Audience manipulation in police records of interviews with suspects' in Coulthard, C.R. and M. Coulthard *Texts and Practices: Readings in Critical Discourse Analysis*. London. New York. Routledge. (pp.167-178).

Criminal Procedure and Evidence Chapter 08:02. Botswana Government Printer.

Crowther, E. OBE. 1984. *Advocacy for the Advocate*. Chichester. Barry Rose Publishers.

Crystal, D. 1997. *The Cambridge Encyclopaedia of Language*. 2nd

Edition. Cambridge. Cambridge University Press.

Danet, B. 1979. Language in the Legal Process' in *Law and Society Review Vol14* No 1 446-524. Basil Blacwell.

- 1980 'Language and the Law.' *Law and Society. Review. Vol 14* NO.3. Spring 1980. (pp.445-564).

- 1990. 'Language and the law: An Overview of Fifteen Years of Research ' in Giles, H. and P. Robinson. *Handbook of Language and Social Psychology*. Chichester. John Wiley and Sons.

Danet, B. and B. Bogoch. 1980. 'Fixed Fight or Free for All' in *Journal Of Law and Society*. Vol7 1980: 36-60.

Delgado, R. 1988 'Storytelling for opposisionists and Others: A Plea for Narrative' in *Michigan Law Review*. Vol.87 1988-89: 2411-2429. University of Michigan. Ann Arbor.

Dipietro, R. J. 1982. *Linguistics and the Professions*. Norwood. New Jersey. Ablex Publishing Corporation.

Dobson, P. and B. Fitzpatrick. 1986 *The Observer Book of Moots*. London. Sweet and Maxwell.

Drew, P. 1985 'Analysing the Language of courtroom Interaction' in In Van Dijk, T. (ed) *A handbook of Discourse Analysis Vol. 3: Discourse and Dialogue*. London University Press.

Dulay, M., Burt, M. and S. Krashen. 1982. *Language Two*. New York. Oxford. Oxford Unoversity Press.

Dunstan, R. 1985. 'Context for Coercion: Analysing Properties of Courtroom Questions. *Law and Society Review*. Vol. 7: 161-177.

Emerson, R.M. 1969. *Judging Delinquents*. Chicago. Aldine.

Fairclough, N. 1989 *Language and Power*. London. New York. Longman.

Fishman, J.A. 1972. 'The Sociology of Language' in Giglioli, P. P. *Language in Social Context*. Hammondsworth. Penguin Books.

Georgapoulou, A. and D. Goutsos. 2000 'Revisiting Discourse

- Boundaries: The narrative and non-narrative modes.
in *Text: an Interdisciplinary Journal for the Study of Discourse*. Vol. 20. 2000.
- Gerwitz, P. 'Narrative and Rhetoric in the Law' in Brooks, P. and P.L. Gerwitz (eds) *Law's Stories: Narrative and Rhetoric in the Law*. New Haven. London. Yale University Press.
- Gibbons, J. (ed) 1994 *Language and the Law*. Harlow. Longman. Language and Social Life series.
- 1995 'Language in Legal Contexts: The 'why question.' *Forensic Linguistics: The International journal of Speech, Language and The Law*. Vol.2 No.1 1995. Routledge. (pp.39-41).
- Goodrich, P. 1984. 'Law and Language: A Historical and Critical Introduction' in *Journal of Law and Society* Vol. 2: 173-195.
- Goodwin, C. and M. Harness Goodwin. 1997. 'Contested vision: The Discursive constitution of Rodney King' in Gunnarson B.L. and P. Nordberg. *The Construction of Professional Discourse*. London and New York. Longman. (p.292-316)
- Grosjean, F 1982. *Life with Two Languages: An Introduction to Bilingualism*. Cambridge. Massachsetts. London. Havard University Press.
- Gumperz, J.J. 1982 *Language and Social Identity*. London. New York Cambridge University Press.
- 1982. *Discourse Strategies*. Cambridge. London etc. Cambridge University Press.
- Gunnarson, B. L. and P. Nordberg (eds) 1997. *The Construction of Professional Discourse*. London. Language in Social Life Series.
- Hale, S. 1997. 'The Law, the witness and the interpreter' in *Forensic Linguistics: The International Journal of Speech, Language and the Law*. Vol.4 No. 2 1997. (pp.39-41).
- Hale, S. and J. Gibbons. 1999. 'Varying Realities: Patterned Changes in

The interpreter's Representation of Courtroom and External Realities' in *Applied Linguistics* Vol 20 No. 2 1999. Oxford University Press. (pp.207-220).

Halliday, M.A.K. and R. Hassan. 1985/89/91. *Language, Context and Text: Aspects of Language in a Socio-semiotic perspective* Oxford University Press.

Harris, S. 1980. *Language Interaction in Magistrates' Courts.* 'A Thesis Submitted to the Univesity of Nottingham. November 1980.

- 1988 'Ideological Linguistics' in Fawcett and Young. *New Developments in Systemic Linguistics*. London. Rueter. (pp.94-112)

- 1994. Ideological exchanges in British Magistrates' Courts' in Gibbons J. (ed) *Language and the Law*. London. New York. Longman. (pp.156-170).

- 2001. 'Fragmented Narratives and multiple tellers: Witness and Defendant acconts in trial. *Discourse Studies*. Vol 3. No.153-74. Thousand Oaks. New Delhi. SAGE Publications.

Haugen, E. 1981. 'The stigmata of Bilingualism' in Pride, J.B. *Aspects of Language Learning and Teaching*. Oxford. London. Glasgow etc. Oxford University Press. (72-85)

High Court Chapter 04:02 Botswana Government Printer.

Jackson, B. S. 1988 *Law: Fact and Narrative Coherence*. Mersyside UK. Deborah Charles Publications.

Kedar, L. 1987. (ed). *Power Through Discourse*. Norwood, N.J. Ablex Publishing.

Keeton, R. E. 1954 *Trial Tactics and Methods*. Boston and Toronto.

- Little Brown and Company.
- Kennedy, G. 1972. *The Art of Rhetoric in the Roman World. 300BC – AD 300*. New Jersey. Princeton University Press.
- Kress, G. 1993. Genre as Social Process: The powers of literacy' in Cope, B. and M Kalantzis *A Genre Approach to Writing*. The Falmer Press.
- Li Wei. 1994. *Three Generations, Two Languages, One Family: Language Choice and Language Shift in a Chinese Community in Britain*. Clevedon. Philadelphia. Adelaide. Multilingual Matters.
- Lloyd-Bostock, S. 1088. Law in Practice: Application of Psychology To legal Decision-making and legal Skills. *British Psychological Society*. The University of Oxford and Routledge.
- Magistrates' Courts Chapter 04:04*. Botswana Government Printer.
- Maley, Y. 1994 'The Language of the Law' in Gibbons, J. (ed) 1994. *Language and the Law*. Harlow. Longman.
- Martin, J.R. Macro-proposals: Meaning by Degree' in Mann, C and Thompson, S.A. (eds) *Discourse Distinctions: Diverse Linguistic Analyses of a Fundraising Text*. Armsterdam. Philadelphia. John Benjamins Publishing Company.
- 1993. 'A contextual theory of language' in Cope, B. and M. Kalantzis. (eds) *The Powers of Literacy: A Genre Approach to Writing*. London. Washington D.C. The Falmer Press.
- Mason, J. 1996. *Qualitative Researching*. London. Thousand Oaks. New Delhi. SAGE Publications.
- McCarthy, M. 1991 *Discourse Analysis for Language Teachers*. Cambridge. New York etc. Cambridge University Press.
- Mead, R. 1085. *Courtroom Discourse*. English language Research Monographs. University of Birmingham Discourse Analysis Monographs.

- Meeuwis, M. and J. Blommaert. 1998 'A monolectal view of code-switching. Layered Code-switching among Zaireans In Belgium. In Auer, P. *Code-Switching in Conversation: Language and Identity*. London. New York. Routledge. (pp.76-100)
- Mertz, E. 1992. 'Language, Law and Social Meaning: Linguistic? Anthropological Contributions to the Study of Law' in *Law and Society review*. Vol.26 No. 2 1992. (pp.413-445).
- Milroy, L. and P. Muysken. 1995. *One Speaker Two Languages: Cross-Cultural Perspectives on Code-Switching*. New York. Cambridge University Press.
- Munby, D. K. and Clair R.P. 1997 'Organisational Discourse' in Van Dijk. *Discourse as Social Interaction*. London. SAGE Publications.
- Myers-Scotton, C. 1995. 'A lexically based model of code-switching' in Milroy, L. and P. Muysken(eds) *One Speaker Two Languages*. London. Cambridge University Press. (pp.233-256).
- 1998. *Codes and Consequences*. New York Oxford. Oxford University Press.
- 2001. 'Calculating Speakers: Code-Switching in a Rational Choice Model' in *Language and Society* Vol.30:1-28.
- Napley, D. Sir. 1983. *The Technique of Persuasion*. (3rd edition) London. Sweet and Maxwell.
- Nyati-Ramohobo, 1996. *Language Policy in Botswana*. Unpublished Workshop Paper.
- Niska, H. 1995. 'Just interpreting: Role Conflicts and Discourse Types in Courtroom Interpreting' in Morris, M. *Translation and the Law*. American Translators Association Monograph Series. Vol VIII 1995. Armsterdam. Philadelphia. John Benjamins Publishing Company. (pp.293-216).
- Ochs, E. 1997 'Narrative' in Van Dijk, T. *Discourse as Structure and*

- Process*. London. Thousand Oaks. New Delhi. SAGE Publishers. (pp.185-209).
- Padilla and Martin. 1992. Similarities and differences between Interpreting and Translation: implications for Teaching. In Dollerup, C. et al.(eds). *Teaching Translation and Interpreting: Training, Talent Experience*. Armstedam. Philadelphia. John Benjamins Publishing Company. (pp.185-203)
- Phillips, S.U. 1987. 'The Social Organisation of Questions and Answers in Courtroom Discourse' in Kedar, L. (ed). *Power Through Discourse*. Norwood, N.J. Ablex Publishing Corporation. (pp. 83-111).
- Pocchacker, f. 1992. 'Teaching Translation and Interpreting' in Dollerup,C. and Loddergaard, A. (Eds) *Teaching Translation and Interpreting: Training, Talent, and Experience*. Armstedam. Philadelphia. John Benjamins Publishing Compnay.(pp. 211-220)
- O'Barr, W.M. 1982 *Linguistic Evidence: Language Power and Strategy in the Courtroom*. New York. London Academic Press Inc.
- O'Barr, W. M. 1981. 'The language of the law' in Ferguson, and S. B. Heath. *Language in the U.S.A*. Cambridge. London. Cambridge University Press. (pp.386-406).
- Padilla P. and A. Martin. 1992. Similarities and differences between Interpreting and Translation: Implications for Teaching' in Dollerup,C. and A. Loddergaard. 1992. *Teaching Translation: Training, Talent and Experience*. Armstedam. Philadephia. John Benjamins Publishing Company. (pp.
- Romaine, S. 1989-98. *Bilingualism*. Oxford. Massachsetts. Blackwell Publishers.
- Sales, B. D. 1981 *The Trial Process*. New York. Plenum Press.
- Schiffrin, D. 1991. 'Conversational Analysis' in *Annual Review of*

Applied Linguistics. Vol1.

- Seale. C. 1999. *The Quality of Qualitative Researching*. London. Thousand Oaks. New Delhi. SAGE Publications.
- Sharrock, W. and B. Anderson. 1983. 'Workflow in a Paediatric Clinic' in Button, G. and J.R. Lee. 1983. *Talk and Social Organisation*. Clevedon. Philadelphia. Multilingual Matters.
- Shuy. W. R. 1986. 'Language and the Law' in *Annual Review of Applied Linguistics*. Vol 7. 1986. 50-62. Cambridge University Press.
- Sinclair. J. and M. Coulthard. 1975. *Towards an Analysis of Discourse. The English Spoken by Teachers and Pupils*. London. Oxford University Press.
- Stubbs, M. 1983. *Discourse Analysis: The Sociolinguistic Analysis of Natural Language*. Oxford. Basil Blackwell.
- Swales, J. M. 1990. *Genre Analysis: English in Academic and Research Settings*. Cambridge. Cambridge University Press.
- Thibaut, J., Walker L. and V. Andreoli. 'Order of Presentation at Trial.' in *The Yale Law Journal*. Vol 82 1972-73. Yale Law Journal Company Inc.
- Thibaut, J. and L. Walker. 1975 *Procedural Justice*. New York. London. Lawrence Earlbaum Associates Publishers.
- Thompson, J. B. 1984. *Studies in the Theory of Ideology*. Cambridge Polity Press. (1985 and 1990)
- Trask, R. L. 1993. *A dictionary of Grammatical Terms in Linguistics*. New York. Routledge.
- 1999. *Key Concepts in Language and Linguistics*. London. New York. Routledge.
- Van Dijk, T. (ed) *Discourse as Structure and Process: Discourse Studies: A Multidisciplinary Introduction. Vol. 1*. London. Thousand Oaks. New Delhi. SAGE Publications.
- Walker. A G. 1987 Linguistic Manipulation: Power and the Legal Setting' in Kedar, L. (ed) *Power Through Discourse*.

Norwood, N.J. Ablex Publishing Corporation.

Walter-Goldberg., B. 1985. *The Jury Summation as a Speech Genre:*

An ethnographic Study of what it means to those who

Use it. A Dissertation of Education Presented to The

University of Pennsylvania in Partial Fulfilment of the

Requirements for the degree of Doctor of Philosophy.

Wickens, P. D. 2001. *Computer Based Learning and Changing Legal*

Pedagogic Orders of Discourse in UK Higher Education:

A Comparative Critical Discourse Analysis of the TLTP

Materials for Law. A Thesis submitted in partial

Fulfilment of the requirements for the degree of Doctor of

Philosophy. University of Warwick, Center for English

Language Teacher Education.

Weinrriech, U. 1953. *Languages in Contact: Findings and Problems.*

The Hague. Paris. Mouton.

Witten, M. 1993. *Narrative and Social Control: Critical Perspectives.*

Newbury Park. London. New Delhi. SAGE Publications.

Wodak, R. 1985. 'Interaction Between Judge and Defendant' in Van

Dijk, T. *A Handbook of Discourse Analysis.* Vol. 4

London. Academic Press.

Apendices

APPENDIX 1

DATA: Transcripts of court proceedings of the Gaborone magistrate's court tape-recorded in the period August to September 1999.

MENTIONS

Tape 1 06-08-99.

Key:

Acc. = Accused

Mag. = Magistrate

Pros. = Prosecutor

Def. Couns. = Defence Counsel

Int. = Interpreter

Wit. = Witness.

Translation from Setswana in to English made by the researcher will be enclosed in brackets.

Case no. 1 06-08-99

Acc: Ke kopa go ntsha submission fa pele ga lekgotla.

Mag: Why do you want to submit today?

Int: Ke eng o batla go submita gompieno e se letsatsi la tsheko?

(Translation: Why do you want to submit today when its not the day of trial?)

Acc: Setswana: ke gore nne ke ithaya ke re (... inaudible) go ko tronkong kwa ke a sotlega gake robale sentle gape ke robatswa ke ke bewa fa gare ga batho ba ba lwalango mongwe o lwalala hela malwetse a dintho o mongwe o bolawa ke TB.ke robatswa ha gare ga batho ba ene re pitlagane.

(Translation: Its because I thought (... inaudible) at the jail there I am suffering I don't sleep well and I sleep in between people who have deseases the other one suffers from diseases of sores and the other one suffers from TB. I am made to sleep in between these people and we are packed close together)

Mag: (Setswana) Jaanong o batla go hudusetswa ko main prison?

(Translation: So now you want to be transferred to main prison?)

Acc: Fa ele gore lekgotla le mpona molato.

(Translation: If the court finds me guilty)

Mag: (Setswana) Jaanong ko main prison gone ga go a pitlagana?

(Translation: Is the main prison not crowded?)

Acc: (silence)

Mag: Report to this court in 21 days for final submissions. I will call upon the prosecutor to help solve your problems at prison.

Pros: Your Worship I would love to have some submission if the accused person had indicated earlier. I would , therefore need time your worship to go through the evidence. We have two counts. The accused person is in fact facing two counts.

Int: Setswana: A re otlala tlhoka nako ya gore a ye go bala bosupi ke gone a tla itseng go submita.

(Translation: He says he'll need time to go and examine the evidence it's then that he'll make his submission.)

Wit: Setswana: Ntlhalosetsa gape. Ga ke a utlwa.

(**Translation:** Please explain to me, I didn't catch what you said.)

Int: A re o batla nako gore a hiwe nako a kgone go bala bosupi.

(**Translation:** He say he wants to be given time to enable him to study the evidence.

Mag: Lets put it off to the thirteenth of August for final submission.

Int: Setswana: Ema ka dinao. O tlaatla ka di 13th o tla go submita. Otlaa nama o le mo kgolegelong go fitlhella ka letsatsi leo.

(**Translation:** Stand up. You'll come on the thirteenth to come and submit. You'll be remanded in prison until that date.)

Acc: Intshwarele Your Worship, jaanong ke tlaabo ke ntsha submission ka nako ya judgement?

(**Trnslation:** Excuse me Your Worship, will I then make my submission at the same time as the judgement?)

Mag: The judgement will be given after the submission.)

Int: Ga twe katholo e tlaa tswa go sena go submitiwa.)

Case No. 2 06-08-99

State versus S. N.

Pros: Your Worship, I represent the state. The case is for mention to set a date for continuation of trial and if I were to suggest dates your worship, I would suggest the twentieth October, 23rd and 24th November. I may have to go out during the month of September so I would not like to commit any date in September.

Mag: (after a long pause looking at the calendar) This case is scheduled for the 24th of November at 8.30 in the morning. Make sure that you notify your lawyer.

Int: Setswana: Gatwe o tlaatla go seka ka di 24 tsa November. O e go bolelela agente ya gago.

Case No. 3.06-08-99

State versus D. G.

Pros: Your Worship I appear for the state eh your worship this case was supposed to be mentioned on the 3rd of August and I was told the accused could no avail himself because... (inaudible) So I apply for a warrant of his arrest.

Mag: Where were you?

Acc: I was there on the second of August... (inaudible) (some confusion about dates)

Mag: So how about .. (inaudible) setting date for next appearance. Here are the dates. The case will be heard on the 16th, 17th and 18th of September. So make sure that you don't miss this one.

Case No. 4 06-08-99

State versus J.A.N.

Pros: Your worship I appear for the state. This case is coming for mention. The accused is remanded in custody and I apply that he remains in custody. I apply for another date of mention.

Int: Are o kopa gore o name o ntse ole mo toronkong.

Acc: ... (inaudible) speaks English.

Mag: (inaudible) dates.

Case No. 5. 06-08-99

State versus B. B.

Pros: Your worship, I appear for the state. The case is for mention. May another date be set .

Def. Couns: Your Worship I appear on behalf of the accused.

Mag: 23rd 24th.

Pros: Yes your worship.

State versus N. S.

Pros: The trial has been set for 11th Nov 1999. The accused person is remanded in custody, your worship.

Mag: We have received a letter from a woman who claims to be she your girl friend.

Int: Setswnana: Gatwe go amogetswe lekwalo ko mongweng a re ke nganyana yo o ratanang le ene.

Acc: speaks Setswana... (inaudible)

Pros: Your worship if it can be a conditional bail, the condition being that he reports to police station twice a week and to surrender his ... (inaudible)

Mag: Where is his mother?

Interpreter: Setswana: O kae ene mmaagwe ngwana?

Mag: Are you prepared to sign bail for one thousand Pula to ensure that he attends the court on the 19th

Interpreter: Setswana. : Aotlaa mo saenela di pampiritsa madi aa lekanang one thousand Pula go itlama gore e tlaa re ka di 19 tsa November otlana teng mo court.

Mag: Stand up accused.

Interpreter: Setswana. Emelela.

Mag: You will be granted bail for one thousand Pula. You will report to the police twice a week on Tuesday and Friday at 7.30 a.m. Trial 18th November. Do you understand?

Acc: Yes your worship.

Case No. 6. 06-08-00

State versus T. S.

Pros: The matter is for mention ,Your Worship and ... The matter is still under investigation It was transmitted to Seargent ...and the matter has been returned to the investigating officer for further investigation Your Worship. I apply that the accused remain in custody.

Interpreter: Setswana: Gatwe dipampiri tsa kgetsi di buseditswe ko ko go ramapodisi dibusitswe ko go baba tlhotlhomisang gore ba tswelle ba tlhotlhomise.

Acc: Gake utlwe.

(Translation: I can't hear.)

Int: repeats.

Mag: Does the accused have a say?

Interpreter: Setswana: Go na le se o batlang go se bua?

Acc: In Setswana: Ke gore ke ne ke batlie charge sheet yaaka. Mapodisi ba ganne ka yone. Jaanong ke santse ke re ke batla charge sheei hela.

(Translation: I had asked for my charge sheet, but the police have refused to give it to me. So still say I am asking for my charge sheet.)

Mag: Why did you refuse with the charge sheet?

Pro: I didn't know that the accused had requested a charge sheet.

Otherwise... (inaudible)

Mag: You don't have it here?

Pros: I don't have it now, You're your Worship.

Mag: O irang ka charge sheet?

(Translation: What do you want to do with a charge sheet?)

Acc: Ke batla go kwalela ko High Court, ke kopa baili.

(Translation: I want to write to the high Court to request bail)

Mag: The police will furnish you with a charge sheet as you have requested and you will appear in court on the 20th of August.

Interpreter: Setswana: Mapodisi ba tlaa go neela charge sheet. O tla tla mo lekgotleng ka di 20.

Case No. 7. 06-08-99

State versus M. G.

Pro: Your worship I appear for the state in this matter. The accused person... (inaudible)

Tape 2 06-08-99

Case No.8. 06-08-99

State versus C. M.

Pros: Your worship, I appear for the state in this matter. The case is for mention and I apply for another date to be set. The accused is remanded in jail.

Mag: How old is he?

Pros: He is nineteen your worship.

Mag: Why did you detain him?

Pros: Eh well eh... your worship eh.. the evidence... in any case I don't have any objection to releasing him. The only reason which we remanded him was that by that time rape was... (inaudible) We know where he stays. He can be granted bail.

Mag: Alright. I will take you in my confidence and grant you bail of one thousand Pula. ...

Int: Setswana: O tlaa saena dipampiri tsa madi a a kanaaka one thousand Pula.gore o letele tsheko o se mo kgolegelong. Otle go ipega ka di 7 tsaga September.

Field notes: How is the existence of other languages addressed by the English only courtroom? In fact the courtroom is not English only. It is very flexible as far as languages are concerned. The main languages being Setswana and English which alternate freely. To facilitate communication – Pattern = when litigants speak Setswana they are heard in Setswana. There is no interpretation for the court but the magistrate makes the record in English. Interpretation is made for the litigant who requires it even if he/she knows some English. Some litigants would start off speaking English and revert to Setswana. Some would respond to English in Setswana. Also, no noticeable waste in time due to interpretation as the pace of the proceeding is itself slow and ponderous with the counsel and prosecutor pausing for the magistrate to take the record. Prosecutors are generally more patient and allow the magistrate a good amount of time to record.

How is communication facilitated by the use of English in court?
English for the record and for the court speaking to itself as in Your Worship I appear for the state... in lawyers addressing the magistrate in submissions and in judgements. English is interpreted into Setswana in the reading of charge sheets. Note, in examination... alternation between English and Setswana when the litigants are involve.

Case No. 9. 06-08-99

State versus R. K.

Pros: Your worship I appear for the state in this matter. This case is coming for mention. I apply for another date to be set. The accused is remanded in prison.

Mag: Is there anything you want to say accused?

Report to the court at 8.30 in the morning of ... September 1999.

Case No. 10. 06-08-99

State versus S. R.

Pros: I appear for the state, your worship. It's a mention . May another date be set, your worship.

Mag: You were supposed to report here on the 9th of July.

Int: Setswana: Ka di 9 tsaga July o ne o le kae?

Acc: Ke ne ka tsena ko Court 4 ... (inaudible.)

Mag: who told you that?

Interpreter: Setswana: A o ne oa tla gone mo court e wa tsena mo.

Pro: I was the one who was supposed to tell him, your worship and you told me to tell him... (inaudible).

Case No. 11. 06-08-99

State versus T. L.

Pros: I appear for the state your worship. The accused person is not in attendance. During the last mention a warrant of his arrest was applied for.

May another date of mention be set, your worship because we are likely to arrest him.

Case No. 12. 06-08-99

State versus M. M.

I appear for the state your worship. It's a mention. May another date be set.
Mag: Accused you have heard my explanation with regard to availability of judicial officers. 8th September.

State versus T. D.

Pros: Your worship I appear for the state. Its still a mention. May another date be set.

Mag: Stand up accused. Anything you want to say.

Int: Setswana: Ema ka dinao. Go na le sengwe se o batlang go se bua?

Mag: Right . As I have been trying to explain that... (inaudible) I hope the officer will be able to set a date of trial. Report on the 7th of November.

Interpreter. Setswana: Ke solofela gore gongwe ka di 7 tsaga November o5tlaatla o beelwa letsatsi la tsheko.

Pros: 7th of November, You worship?

Mag: 7th of September.

Pros: Thank you your worship.

Mag: I had said what? November?

Pros: Yes Your Worship.

Case No. 13. 06-08-99

State versus M. M.

Def Couns: If it pleases the court, I appear for the accused your worship.

Pros: May I appear for the state your worship. (note: A terms of introduction modal question. And an 'if' clause.)

Case No. 14. 06-08-99

State versus P. M.

Pros: I appear for the state your worship. The case is coming for mention, your worship and I apply for another date. (note: the first use of conjunction linking the various stages of the mention.)

Case No. 15. 06-08-99

State versus K.N.

Pros: Your worship, I appear for the state. The case is coming for mention. The accused is remanded in custody and I apply for further detention and yet another date of mention. (note even more conjoining perhaps the case is one at the end of the court day? Perhaps the pros had mentioned a number of cases.)

APPENDIX 2

DIRECT EXAMINATIONS/EXAMINATIONS-IN-CHIEF

Tape Number 8

Case Number 23 15-08-99 State versus M. S.

Direct Examination

Pros: Do you know the accused person?

Wit: E rra ke a mo itse.

(Yes sir, I know him)

Pro: Could you please tell this honorable court how you came to know the accused?

Wit: (speech missed out.)

Pros: Yes , could you please tell this honorable court where and where this accident took place?

Wit: Accidente e e diragetse ka di 13 tsa Mmarch.

(the accident happened on the 13th of March)

Pros: Where this accident happen?

Wit: On...

Pros: Could you please tell this court what happened?

Wit: Nna erile fela... ka bona koloi e tshweu... ha ke tshwanna go hapaana le yone ke tsamaya ka fa lebogong la left...

(I saw a white car... when I was just going to pass by it... while I was driving on the left side of the road...)

Pros: Were you alone?

Wit: Ke ne ke na le rre M. M.

(I was with Mr M. M.)

Pros: can you tell the court what could have caused the accident?

Wit: accidente e kane e causitswa ke gore rre ... mme o ne a lebega a thetheekela a nole bojalwa.

(the accident may have been caused by the accused because he was walking in a zig-zag manner of drunk person.

Pros: Why do you say the accused person was drunk?

Witness Ke ne ke utlwa bo nkgga mo go ene. Gape one a nkatumetse thata. Nne ra nna ra buisanaka metsotsonyana mme fela mo ganong one a sa bue sentlefel jaaka motho a tshwantse a bua. Ke be ke mmotsa gore ba a nang a na le bone ba kae. A ba a re 'ga ke itse.'

(I smelled it on him because he was very close to me. We talked for some minutes and he was speaking in a slurred speech manner. I asked him where the people he was with in his car were. He said 'I don't know')

Pros: Did you report this accident to the police?

Wit: E rra, rre you ke ne ke na le ene o ne a na le cellophone.

(Yes sir. The gentleman I was with had a cellophone.)

Pros: Yes and did the police come to the scene?

Wit: Ee a ne a tla gone foo.

(Yes they came immediately.)

Pros: And what did they do?

Wit: Ba ne ba measura dikoloi

(They took measurements of the cars)

Pros: Yes and did the police..? (inaudible)

Wit: (inaudible)

Pros: And what happened at the police station?

Ko police statione ba fitile ba tsaya statemente. Ba bo ba mpolelela gore ba nkhupisa tame. Ke be ke ba bolelela gore ga ke minde go hupa tame.

(At the police station they took the statements and told me that they would put the dummy in my mouth. I told them that I didn't mind them putting the dummy in my mouth.)

Pros: Yes and did they conduct the test only on you?

Wit: Ba ne ba testa mo go nna ba bo ba bitsa rre yole akere jaanong nna ke be ke tswela ko ntle.

(They did the test on me and then called that man so I went outside.)

Pros: Yes and after they finished with the accused person then what happened?

Wit: Ba ne ba nthaya bare ke tsamaye.

Pros: Where did the accused person go?

Wit: Ga kea mmona ko a ileng teng.

(I did not see where he went to.)

Pros: Did you get the chance to see the accused the following day?

Wit: E rra.

(Yes, sir)

Pros: How would you describe him?

Wit: (can't describe him)

Mag: Now would you ...(inaudible)

Wit: Nnyaa ba ne ba re ga ba bone statement.

(They said they could not find the statement.)

Field notes: skill of prosecutor – asking questions whose answer he could not anticipate. Note lexical insertion of English word into Setswana syntax.

Tape Number 3 DIRECT EXAMINATION

Case no. 18

Police Wit: I swear that I will tell the truth, the whole truth and nothing but the truth.

Pros: Could you please tell this honourable court your particulars?

Pol. Wit: ...(inaudible)

Pros: Try to raise your voice

Pol. Wit: 9948 Constable Motsumi.

Pros: Your age?

POL. Wit: I am 26 years old.

Pros: Your residential address?

Pol Wit: ... Gaborone West.

Pros: Where are you stationed?

Pol Wit: I 'm stationed at Urban Police.

Pros: Do you know the accused person.

Pol Wit: I know the accused person.

Pros: how do you know the accused person.

Pol Wit: ...(inaudible) At about half past one I was patrolling

Pros: Were you alone?

Pol Wit: I was with Sergeant Chama.

Pros: Mobile or on foot?

Pol Wit: I was driving following vehicle B639ACS That vehicle turned towards eh the dumping site I wondered why he should be driving towards the dumping site at that hour and I followed him and I flicked the head lamps to alert the driver. The vehicle pulled of the road. We got out of the vehicle and went over to the accused. Sergeant Chami talked to the accused.

Pros: What was Chami discussing about with the accused?

Pol Wit: I think he was demandind the driving licence>

Pro: You didn't hear the conversation?

Pol Wit: I only heard the part about the driving licence.

Pros: So what was the response of the accused to sergeant Chami's demand for the driving licence?

Pol Wit: the accused told sergeant Chami that he didn't have a drivers' licence.

Pros: Was the accused drunk?

Pol Wit: The accused was drunk (inaudible) and I heard from sergeant Chami that he suspected the accused of having been driving under the influence of alcohol and eh sergeant Chamim drove the accused's vehicle to the police station and I followed behind in the police vehicle.

Pros: Where was the accused person by then?

Pol Wit: The accused person was in the police vehilcle.

Pros: Where was sergeant Chami driving the the accused person's vehicle to.

Pol Wit: He drove to Borakanelo Police Station.

Pros: And what happened?

Pol Wit: At Borakanelo Police Station . Sgt. Chami asked the accused person to provide a sample of breath.

Pros: Were you present by then?

Pol Wit: iwas present.

Pros: Then what happened?

Pol Wit: The accused person provided the breath>

Mag: He just asked him to provide the breath?

Pol Wit: He had explained the accused 's rights to him.

Mag: What did he say?

Pol Wit: he told him that (mixed up explanation, inaudible) the accused person provided a breath sample and later the print out was... inaudible.

Pros: Did he see the results?

Pol Wit: the results were shown to the accused.

Pros: What happened to the accused person afterwards?

Pol Wit: the accused person was finger printed.

2nd Pol Wit: I number 9475 Sergeant Chami.Do hereby swear that the evidence I shall give is the truth, the whole truth and nothing else but the truth so help me God>

Pros: Could you please tell this honourable court your full particulars?

2nd Pol Wit: My name is Emmanuel Chami, house no. 25024 age 29.

Pros: Stationed where?

2nd Pol Wit: Stationed at Borakanelo Police Station>

Pros: Which branch?

2nd Pol Wit: At the traffic branch.

Pros: Do you know the accused person?

2nd Pol Wit: Yes I know the accused person.

Pros: Will you please tell this honourable court how you came to know the accused?

2nd Pol Wit: I came to know the accused person I met him along the Machel Road while he was driving past the robots. On the 14th of November 1998 I was on patrol along in a police motor vehicle which was driven by constable Tsholo> It happened that eh while were along this road, there was a Toyota Corolla in front of us.

Pros: At what time?

2nd Pol Wit: It was around 01.15 hrs.

Pros: Go On.

2nd Pol Wit: and when he came to the show ground this Toyota Corolla turned eh to the right towards the dumping site.

Pros: Do you know the registration number?

2nd Pol Wit: Yes B693ACM.

Mag: M? Wit: Yes your worship, M for Monkey.

2nd Pol Wit: The driver of the Toyota Corolla pulled off to the side of the road and I move out of the police vehicle and...

Pro: How many occupants were in the Toyota Corolla?

Wit: There were two occupants in the Toyota Corolla>

Pros: Who was the driver then?

Wit: The driver I later realised that he was Phineas Mbaiwa

Pros: So after approaching the motor vehicle what did you do?

Wit: I then greeted the driver and demanded a drivers' licence from him. And then he replied that he doesn't have a drivers' licence. And during that time I sensed a smell of alcohol from his mouth. I then told him to get out of his motor vehicle. Then I saw a Castle Lager on the platform of the left leg. I explained to him that to drive a motor vehicle without a drivers' licence is an offence and also that I was suspecting him to have been driving while he was drunk. I went further to explain to him eh his rights concerning the drunken driving issue.

Pro: Which were the exact words you used concerning the drunken driving?

Wit: I told him that he has the right to provide a specimen of breath at a place I would take him to. **Continue in Tape number 4**

but if he refuses without any reasonable cause his refusal will be taken as supporting evidence for the prosecution and as a rebutting evidence against evidence given by him in court as his defence. He agreed to be breath tested.

Pros: So after he agreed what did you do with the accused?

Wit: I then used the SD2 machine to test him.

Pos: So what were the results of the testing the 6 testing machine?

Wit: It was 1.15 milligrams per litre of breath.

Pros: The after that?

Wit: The after that we went to the police station because it was in excess of the prescribed 0.0025 mg. Per liter of breath.

Pros: How did you move from the scene to the police station, were you walking from the scene?

Wit: We were driving. I was driving the accused's vehicle

Pros: where was he?

Wit: He was in the police vehicle.

Pros: which police station were you driving to?

Wit: I drove to Borakanelo Police Station. Getting to Borakanel Police Station what did you do?

Wit: When I got to Borakanelo Police Station I went with the accused person into the testing room. I breath tested him using Lion Intoxilser 1400 and I issued him with the slip which was produced by the machine

Pros: What were the results from the intoxiliser?

Wit: 0.779mg per litre.

Mag: Zero point?

Wit: 779mg per litre.

Mag: Go on.

Pros: How many copies were produced?

Wit: Three copies were produced.

Pros: What happened to them?

Wit: The other one I gave to the accused himself, the other one was filed in the police docket and the other one...

Pros: Did you ever show the results to the accused?

Wit: Yes I did.

Pros: Did he acknowledge the results?

Wit: He acknowledged Your Worship and he even signed the slip.

Pros: Was the machine serviceable?

Wit: Yes it was serviceable Your Worship. It was calibrated in June 1998.

Pros: Could you identify the machine which you used?

Wit: Yes your worship, it has the serial number 14000456.

Pros: So after you served the accused with the print out what did you then do?

Wit: I warned and cautioned him of the charges of driving a motor vehicle while unfit to drive through drinks. That was count one and count two driving a motor vehicle without a drivers' licence.

Tape Number 5 side A, case no 19

Pol Wit: On the third day of October 1998 a road traffic accident was reported to me by ... (inaudible) It occurred along the Tlokweng/Zeerust road, near Oasis motel.

Pros: What time was the accident reported to you?

Pol Wit: The time was 19.30.

Pros: What did you do after receiving the call?

Pol Wit: Constable (inaudible) asked me to assist him since he suspected that one of the two drivers was drunk.

Pros: When this accident was reported to you what did you do?

Pol Wit: I went to the scene of the accident where I assisted to.
(inaudible)

Pros: Do you still remember the registration numbers of the vehicles involved?

Pol Wit: I still remember the registration of B662AAN and the other one ah CNP 365 **Pros:** And what did you do at the scene?

Pol Wit: Constable(inaudible) told me thay he had already tested the two drives and the drivers of the Nissan Sentra had exceeded the prescribed limit.I then drove to the police station

Mag: let me get this clear..the constable had already breath tested the

Wit: Yes your worship.

Mag: And he called you come and assist?

Wit: Yes your worship because...

Mag: So you took him to the office/

Wit: I was accompanied by the accused person your worship.

Pros: What about the other driver?

Wit: The ather driver driving his car.

Pros: What happened at the police station.

Wit: On arrival your worship to the police station,I introduced the accused person to the intoxiliser machine.I told him that he has the right to

Pros: Did you explain to the accused his rights?

Wit: I told him that he has the right to refuse to be breath testedI explaine to him that his reusal to be breath tested would support state evidence.

Pros: What happened the?

Wit: He supplied the breath specimen.

Pros: What was the reading of the breathaliser?

Wit: 1.1mg per litre of breath.

Pros: Did you show him the result?

Wit: I showed hi the result.

Pros: And did he sign the slip?

Wit: Yes your worship he did sign.

Pros: Was the breathaliser calibrated?

Wit: Yes your worship.

Pros: Are you introducing this certificate as evidence?

Wit: Yes Your worship.

Def Couns: Your worship we can only admit the certificate when...(inaudible)

Tape No. 8 Case no. 23 15-08-90

State versus M. S.

DIRECT EXAMINATION

Pros: Do you know the accused?

Interpreter: Gatwe a o itse mosekisiwa.

Wit: E rra ke a moitse.

(yes Sir ,I know him.)

Pros: Could you please tell this honourable court how you came to know the accused person?

Pros: Yes, can you tell this honourable court how you came to know the accused.

Int: O mo itsile jang?

Acc: Inaudible.

Pros: Wheredid you say the accident happened?

Wit: Gone mo Broadhurst fa o hapaanya strata se se tswelang ko
(here in Broadhurst when you come to cross the street which goes out to...

Pros: Could you tell this court what happened.

Wit: Nna erileha ke tsamayamo striating hela ha ke lebile go emake bone koloi e ngwe e tshweue tswa ko pele game mme ebe e tswa mo teng ga tsela. Ha ke tshwantse ke go hapaana le yone ke tsamaya mo lebogong lame
(Me while I was driving along the street just about to stop I saw a white car coming from the opposite direction and then it got out of the road. When I was just about to cross with it keeping to my side of the road ...

Int: Ka nako tse he

(about what time?

Acc: Ga ke gakologelwe gore nako e kabo ene ele ka bo to eight and nine mme e tshwanetse e be ene ele nine.

(I don't remember it must have been to eight or nine but it must have been nine.

Pros: Yes to what direction was this motor vehicle which collided with you

Wit: E ne e tswa..(inaudible)

(It was coming from...)

Pros: Yes ,can you describe particulars of the motor vehicle....(inaudible)

Wit: (inaudible)

Pros: Did you have the chance to see the registration number

Wit: Ga ke ise ke nne le chance ya go leba the registration numbers ka nne ke chokegile.

(I did not ge the chance to lok at the registration numbers because I was shocked.)

Pros: Yes, were you alone.

Wit: Nne ke na le rre Marks Montshiwa.

(I was with Mr Marks Montshiwa.)

Pros: Can you tell this court what could have caused that accident?

Wit: Accident e e kabo e causitswe ke gore rre erile ha ... koloi e sena go... aba a tla ko go nna a re ke wena othudisitseng ke be ke mo raya ke re nnyaa ke wena o nthudileng. Mme o ne a lebega a thetheekela a nole bojalwa.

(The accident may have caused by that this gentleman after the collision came to me and said its you who caused the collision and I said to him no its you who has hit me but he was staggering as if he was drunk no he was drunk not as if.)

Pros: Why do you say the accused person was drunk?

Wit: Nee bo nkgam go ene ebile nna a nkatumetse ha a nthaya are ke mo thudile.

(I sensed the smell of alcohol on him and he was also close to me when he told me that I had hit him)

Pros: Go on.

Wit: Nne ra nna ra buisanya ka metsotsonyana.Mme o ne a sa bue hela sentle jaaka motho tshwanetse gore a bue le yo mongwe.One a ...

(We continued to argue for some minutes but he wasn't just talking properly as a person should speak to another person. He was..

Pros: Yes did you report that accident?

Wit: E rra . Rre you ke neng ke na le ene o ne a na le cellophone.

Pros: Yes, and did the olice come to the scene of the accident?

Wit: Ee, mapodisi a ne a tla

Pros: And what did they do?

Wit: Ba ne ba measura dikoloi baq bo ba re tseela kwa police station.

(They made some measurement s of the cars and took us to the police station)

Pros: And what happened at the police station?

Wit: Ko police statione ba feta ba tsaya statement be ba re ba mpolelela gore ba nkhopisa tame ke be ke ba bolelela gore ga ke mind(e) go hupa tame ka gore ga ke a nwa bojalwa.

(At the police station they took the statement and then the told me that they would put the dummy into my mouth and I told them that I don't mind putting the dummy in my mouth because I haven't drunk any beer.

Pros: Yes, did they conduct the test only on you?

Wit: Ba tsere test(e) moo nna ba bo ba bitesa rre yole akere jaanong nna ke be ke tswela kontle. Ke ha ke tsamaya.

(The, they took the test on me and then called that gentleman and then I wentout and went away.)

Pros: Yes, after they finished with the accused person wht what happened?

Wit: Ba ne ba nthaya ba re ke tsamaye

Pros: Where did the accused person go?

Wit: Ga ke a mmona ko ayang teng ka gore phakela wa teng ak nne ke .. ene o ne a seyo.

(I did not see where he went because that morning when(inaudible) he was not there.)

Pros: Yes Did you have the chance to see the accused person the following day?

Wit: E rra

Pros: How would you describe the accused person did you have the chance...

Wit: Ga ke a mmona.

(I did not see him)

TAPE NO.9. DIRECT EXAMINATION OF 2ND WITNESS IN THE CASE NO.23, STATE VERSUS M. S. 15-08-99

Pros: Do you know the accused.

Int: Gatwe a o itse mosekisiwa.

Acc: Nnyaa.

(No.)

Mag: Have you never seen him anywhere?

Int: ga o iseko o mmone gope?

Acc: No

Int: Ke santlha o mmona?

(Are you seeing him for the first time?)

Wit: Silence

Pros: Do you know why you have been brought to court?

Int: A o itse gore o tletse eng mo kgotleng?

Wit: E rra ke a itse.

(Yes sir I know.)

Pros: Can You tell the court why?

Wit: ke tletse go fa bosupi.

(I have come to give evidence.)

Mag: Can you tell the story.

Wit: Inaudible and inarticulate)

These two examinations were deleted by mistake twice and the third time the cassette tape broke. A great pity really as it included excellent interpretation for the accused.

Pros: Can you tell the court your name number and rank?

PW: I am number 3680 Constable...(name)

Pros: Do you know the accused person?

PW: e I know the accused.

Pros: Yes can you tell this honourable court how you came to know the accused person?

PW: I came to know the accused person on the 15th of March 1999 at about 9.15pm when he was involved in a car accident.

Pros: Where was this accident?

PW: The accident was along Segoditshane Way near the traffic circle..

Pros: Yes, Can you tell this court the number of vehicles involved in the accident?

PW: Yes there were two vehicles.

Pros: Can you tell the court how the accident happened?

PW: According to the statements I took, the driver of B786ACI was driving south and the accused was driving north. The lady says the accused got out of his lane and knocked her car.

Pros: Did you find both drivers at the scene of the accident?

PW: Yes I found both drivers at the scene of the accident.

Pros: And what happened?

PW: On arrival to the scene I drew a sketch plan in the presence of both drivers and after I finished drawing the sketch plan I showed it to both drivers and the driver of B786ACI told me that she agreed with what I had drawn then I told her to append her signature on the sketch plan but the accused told me that he didn't agree with the sketch plan and he refused to sign.

Pros: Did he tell you why he refused to sign?

PW: He told me that he didn't agree with what I had drawn.

Pros: According to your observation how was the accused?

PW: The accused person was smelling alcohol. I then told both drivers that I am going to test them using the Lion Intoxiliser 1400. Then I took both drivers to the Broadhurst Police Station. Then I took the accused first. Before I tested him I told him that he is not obliged to provide breath. But if he refused to provide a breath specimen it would be taken as evidence for the prosecution that he was indeed driving under the influence of drinks. The accused agreed to provide breath and the result was 1.4mg per litre of breath.

Pros: Yes what machine were you using?

PW: I used the Lion intoxiliser 1400 and the intoxiliser was bearing the serial number 14000523. I then called the other driver.

Pros: Did you have the chance to show the accused person the results?

PW: Yes I showed him the results.

Pros: Did he show any signs of contesting the results?

PW: No.

Pros: Was he made aware that if he contested the results he could be blood tested?

PW: I made him aware of the right.

Pros: Was he given a copy of the results?

PW: Yes and he also put his signature.

Pros: Was he warned of any charges?

PW: Yes I warned him of the charge of driving whilst under the influence of drinks.

Pros: Was the machine you use on that particular day in good working order?

PW: Yes and I tested the other driver and the result was 0.0mg per litre of breath. Before I tested her I made her aware of her rights.

Pros: And what proof do you have that the machine was in good working order?

PW: I have its certificate of calibration.

Pros: Besides the calibration certificate, can you enlighten this court how the machine works?

PW: If the machine doesn't work it would not give the results.

Mag: And how long have you been using this machine?

PW: A year and six months.

Pros: Yes you said you made a sketch how would you identify the sketch plan?

PW: I can identify it by my signature and the signature of the other driver and the road where the accident happened.

Pros: Yes, have a look at this sketch plan and tell the court it's the same one you drew.

PW: Yes. It is.

Pros: Are you now producing it as part of the evidence?

PW: Yes I would like to.

Pros: How would you identify the print out from the machine you use?

PW: I can identify it because it has my signature and the accused's signature and the serial number of the machine 14000525.

Pros: Have a look at this print out and tell the court whether it is the same one.

PW: Yes it is the one.

Pros: Do you now produce it as part of the evidence?

PW: Yes I would like to.

Pros: Do you produce the calibration certificate as part of the evidence also?

PW: Yes.

Pros: Was he made aware that he exceeded the prescribed limit of 0.3 mg per litre of breath?

PW: Yes.

Pros: Was he warned of any charges?

PW: He was warned of the charge of driving whilst unfit due to the influence of alcohol.

Mag: Do you have any questions accused?

ACCUSED CROSS EXAMINES THE WITNESS.

Acc: A ware ke ganne go saena statement?

(Are you saying I refused to sign the statement?

PW: Yes.

Acc: Bosupi ja gago ke eng gore ke ganne. O bue boammaaruri.

I What is your proof that I refused? You must tell the truth.)

Acc: O mpuduletse ga kae?

(How many times did you make me blow into the machine?

PW: Ga one.

(Once)

Acc: Ga one Ako o leke go bua boammaarure, o mpudeledisitse ga kana ke be ke go botsa gore a tota machine o wa gago waa bekeka?

(Once? Try and tell the truth you made me blow into the machine so many time and I even asked does this machine of yours really work?)

Case number 24. Tae 9 15-08-99

Witness sworn in.

Pros: Yes, Can you tell this court your number rank and name?

PW: I am number 1101 constable Ditshupo.

Pros: Where are you stationed?

PW: Broadhurst Police Station Traffic.

Pros: Do you know the accused?

PW: Yes.

Pros: Tell this court how you came to know the accused.

PW: I came to know the accused in June 1999 when we were on patrol on Nelson Mandela Road.

Pros: What time was it?

PW: It was around 11.50pm.

Pros: Yes, what attracted you to the accused's vehicle?

PW: WE were proceeding in the same direction, his vehicle was going in a zigzag manner. He nearly drove into the traffic light pole. WE were surprised by his driving. Then we followed him I was accompanied by Sergeant Boitumelo who was driving. He tried to flick on the headlights to tell him to stop but he kept on driving. Later he stoped. We got out of our vehicle and went over to the accused's vehicle. Sergeant Boitumelo told the accused to get out of his vehicle who then introduced himself as Moreetsi Sebetlela. Then as Sergeant Boitumelo was talking to the accused I sensed a strong smell of alcohol in his breath, his eyes were red. Sergeant Boitumelo told him about his SD2 alcometer. He made him aware of his rights before he tested him. He told him that he was ot obliged to provide a specimen of breath but failure to provide preath is an offence unless there are valid reasons like health reasons. The accused consented to be tested. Then Sergeant Boitumelo told him that the prescribed limit is 0.35 mg per litre of breath and anything which exceeds that he would be further tested on another machine which releases a print out. His results were 0.80 mg per litre of breath. Then

Sergeant Boitumelo took him for further tests . It was the I stayed behind on patrol.

Mag: Any questions accused?

Acc: Nnyaa rra.

(No sir.)

2nd Witness sworn in.

Pros: Can you tell this honourable court your name?

PW: I am number 7042 Sergeant Sesana Boitumelo.

Pros: How old are you?

PW: I am 33 years old.

Pros: Where do you work?

I am stationed at Broadhusrt Police Station Trafic department.

Pros: Do you know the accused.

PW: Yes I know the accused person whe I came across him on the 18th of June 1999. He was driving a Toyota Hilux bearing the plate numbers 17554. It was at the traffic lights at Metro when the accused nearly drove into the robot light. It when I followed the accused flicking the headlights to stop him. I followed him for the distance of about 500 meters from the traffic lights. At last the accused stopped his vehicle by the side of the road. I Then requested the accused to come out of his vehicle. He was staggering also he was smelling alcohol on his breath. I then took the alcometer from our vehicle and came to the accused. Where I told him that I am going to test him on the alcometer to see if he is drunk when driving. Before I tested him I told him he was not forced to give breath also I told him that his refusal will support my suspicion that he was driving under the influence of alcohol. The accused did not refuse to be tested and the results were over the prescribed limit of 0.35 ml alcohol per litre of breath. He was tested and the results were 0.80ml per litre. I told the accused that he will be further tested on another machine call Lion Intxiliser 1400. I then tok the accused to Old Naledi Police Station then \i took the 1400 Intoxiliser and told the accused again that he is not forced to give a specimen of breath and that his refusal will again support my suspicion that he was driving under the influence of alcohol. I then tested the accused with the machine. The results were 1.16ml/litre of breath and that he was over the prescribed limit of 0.35. After the machine had given out the printout I showed it to him. The accused did't contest the results. He signed the print out and I signed it. I then warned the accused that he will face a charge of driving a vehicle whilst under the influence of alcohol.

Pros: How would you identify the print out.

PW: I can identify the print out by the serial number of the machine also by the name of the accused.

Pros: Have a look at this print out and tell the court if it is the print out produced on that date.

PW: This is the print out.

Pros: Do you now tender it to this court as part of the evidence.

PW: Yes.

Tape number 10 case number 24 15-08-99

Accused gives sworn evidence.

Mag: Yes, you said you would give evidence under oath.

Int: O rile o tlaa ikana o rile o tlaa ha bosupi o ikanne?

(You said you would give evidence under oath?)

Acc: E rra

(yes sir)

Int: Go siame ya ko ...

(Okay. G to the witness stand.)

Int: O Moreetsi Sebetlela.

Acc: Yes.

Dingwaga tsa gago di kae?

(Your age?

Acc: 44.

Int: Ee tswelela o re bolelele.

(Okay. Go on and tell us.)

Acc: Ene yare ka di ga keitse gore ke di kae.

(On the I don't know what date..)

Acc: abe

Int: O sekela melato e me bedi. Gona le wa di 2 tsaga rch O go tweng o ne wa thualana le mosadi yo o neng aa fa bosupi, le wa di 18 tsaga June o gotweng o ne wa rata go thula roboto.

(You are facing to charges. There is the one for the 20th of Marh Where you are charged with colliding with the woman who has just been giving evidence and the one fo 18th of June when you are charged with drunken driving.)

Acc: Ehe

(Recognition)

Int: Ee tswelela o re bolelle.

(Yes, go on and tell us.)

Acc: Ene ya re ka di 20 ya re ke tla ke labile circle e e ha Community Hall, Koloji engwe ya tswa ka ko pelega ke itse plate numbera ya teng mme yone ele tshweu. Yare e tswa mo circling... mme yare rentse re eme mo circling mapodisi a tla ba bo ba reisa ko police. Mme yare re tsena ko police ba nkhopisa tamemorago ga foo bampolelela gore ke nole. Mee nna ka ba raya kare ke itekanetste. Mme yare morago ga foo balatele di koloji tsa rona. E be ke e latela. Jannonong a nka tsena ka wa di 18?

Mme yar ke tswa mo dirobotong ba nkemisa. Ba nthaya ba re ke fologe mo koloing ba nthaya bare ba belaela fa ke nole. Ke ha ba nkhopisa tame.

Case no 2 EXAMINATION of prosecution witness Supplementary data

Pros: I appear for the state Your Worship.

Def Couns: I appear for the accused, Your Worship.

Pros: Would you please tell this court your name?

Int: Maina a gago ke mang?

Wit: (inaudible)

Pros: How old are you?

Int: O na le dingwaga tse kae?

Acc: Ha ke tswhara sentle ke 19.

(If I am getting them correct its 19)

Pros: Are you employed?

Int: A o a bereka?

Pros: Where do you stay?

Int: O nna ko kae?

(inaudible)

Int: Ga o utlwale.

(you are not audible)

Pros: Do you know one Thabang Thamage?

Int: O itse Thabang Thamage?

Pros: Please tell this court what happened to Thabang Thamage on the 23rd of October 1998.

Wit: Ene yare ka di 23 tsa ga October (long inaudible narration)

Ke ne ka lemoga ha Thabang a seo ha morago ga rona. Ene yare re bona a seyo ra kgabaganya tsela.

(On the 23rd of October 1998 (audible narration) I realised that Thabang was not there behind us, so when we realised that he was'nt behind us we crossed the road.)

Wit: E be ele gore ha re setse re kgabaganya go bo go tlhaga koloi ...

(just after we crossed the road, a car came by)

Pros: Ke le setse le tlodile tsela.

(Was it after you had crossed?)

Wit: Erra.

(Yes sir.)

(Inaudible, witness describes the circumstances of the road accident in which Thabang the young boy whose sister the witness is, was killed)

Tape 2 case no. 3 DIRECT EXAMINATION 10-01-2000 Supplementary data

PW: I swear that the evidence I shall give before this court shall be the truth the whole truth and nothing else but the truth so help me God.

Pros: Please can you introduce yourself to the court?

PW: I am number 7551, ... stationed at Broadhurst...

Pros: Yes do you know the accused?

PW: Yes my lord.

Pros: Yes, Can you tell this honourable court how you came to know the accused person?

PW: Yes Your Worship. On the 24th day of September 1999, I had a case at Gaborone West your Worship. I had to be there at 0830 hours. At around 0810 I took a police vehicle and drove along Lemmenyane Drive. I was following a queue of motor vehicles from which some were joining Nelson Mandela Drive and some were joining and some were joining turning right and I was going to turn right. My vehicle was the third one from the accused's motor vehicle, which was in front. As soon as the accused's motor vehicle has passed along the bus stop turning west, his motor vehicle turned went extremely left off the road to the gravel side. It increased speed and hit a no stopping sign. His vehicle went on facing Taung BHC houses and later the driver the vehicle slowed down and returned back to the road to the tarred road. As he had joined the tarred road, I thought he would find a place to stop but unfortunately he just kept on driving. I wondered as to why the driver did not stop as he had knocked an official stop sign. But I increased speed to go and stop the accused. Before we could reach the railway line I managed to stop him and told him to get off the road I quickly went to the vehicle and I found that he was with one passenger who was by then asleep. I greeted him

and I called him off the vehicle. I opened the vehicle door and in the driver's side and requested him to come out of the vehicle of which he did. I asked him whether he didn't see that he had knocked the no stopping sign. And he did not get off the road. I asked him why he didn't stop and he said he was (inaudible) and as he was talking to me answering my questions I detected a strong smell of alcohol from his breath. Having detected a strong smell of alcohol from his breath I asked him whether he had been drinking alcohol and he said he had some he took some drinks alcoholic drinks last time. I called him to the left side of the vehicle and asked him to wait for me while I was checking his door of his passenger. The passenger woke up and I asked him why he was asleep in a vehicle and he said he is tired. I asked him whether he had seen the vehicle knocking the no stopping sign and didn't see anything he was asleep. I told him his driver had knocked a no stopping sign and he said 'where?' I pointed at the no stopping sign and he said he didn't see anything. I went back to the accused person and told him that I am suspecting him to have been driving whilst unfit to drive through drinks and he said he only took alcohol last night. As I was still talking to him Constable Solomon who is stationed at Urban Police Station came with a police vehicle, I stopped him so that I can use his police radio since my vehicle had no radio. I called Constable Motshosi who was on patrol that day to come and assist me since I had to be at court during that day. Constable Motshosi immediately arrived and after he had arrived I introduced him to the accused and explained to him what actually happened. Constable Motshosi came closer to the accused and asked him some few questions. Later he told him that he is also suspecting him to have been driving whilst unfit through.... And that to prove our suspicion is only through the use of the breathalysers SD2 and the accused person said he did not want the test and Constable Motshosi said he hadn't yet finished to explain to him. He continued explaining to him that he is not forced to provide a specimen of breath but he can only provide breath through his will, failure to provide a specimen of breath without reasonable excuse would be a supportive evidence that he had been driving whilst unfit through drinks and that he could only refuse to provide a specimen of breath on medical grounds. He explained to the accused that the prescribed limit is 0.35 mg of alcohol in 1 litre of breath and that if he exceeds the prescribed limit he would have to undergo another test by the use of the breathalysers and the accused continued to say he does not want to be tested and I told Constable Motshosi that since I had to be at court at 0830 I told him to remain with the accused. When I came back from Gaborone West and that was in the afternoon, Constable Motshosi told me that the accused had completely refused to provide a breath specimen and he was charging him for driving a motor vehicle whilst unfit to and with failure to provide a breath specimen.

Pros: Yes can you tell this court the registration number of the accused person's motor vehicle.

PW: The registration number of the accused's vehicle was B983AEB.

APPENDIX 3

CROSS EXAMINATION

Def Couns: So did you explain to him that what is required is the amount of alcohol in a suspects breath at the time of driving?

Wit: Yes your worship.

Def Couns: Now you say the results obtained some 3 hours after driving is a true reflection of amount of alcohol in the suspect at the material time?
(note the use of jargon to buy time on the part of counsel)

Wit: Your Worship it might have gone down.

Def Couns: It might have gone up it might have gone down it doesn't matter
What I am saying is will it be a true reflection of the amount of alcohol at the time of driving?

Another police witness sworn in and examined by prosecutor.

CROSS EXAMINATION Tape 5 side B

Def Couns: At approximately what time?

Pol Wit: Earlier on I said half one.

Mag: And you can't approximate the time? 30 Minutes after the accident?

Wit: Around that time.

Def Couns: So that makes it around 10o'clock?

Pol. Wit: Yes, somewhere there.

Couns: At what time did you subject eh or what time did you er sub
inspector Zambezi subjectedf the accused person to a breath test?

Pol. Wit: After we arrived at the police station.

Couns: What time

Pol. Wit: I wasn't... (inaudible)

Couns: So I wouldn't be wrong to say it was around 10.30pm

Pol. Wit: If that wasn't the time you'd be wrong.

Couns: But that's the time that's written on this statement.

Pol. Wit: Yes in fact that is the time.

Couns: Which is a period of more than eh say three and a half hours.

Pros: (inaudible)

Couns: Simple as the accident occurred at seven and the breath test was made at eleven so that was three hours and thirty minutes.

Pol. Wit: Yes your worship.

Couns: So why did it take so long in subjecting the accused to the breath test?

Pol. Wit: As I said earlier on, the accused was co-operating in the sense that he was taking long to understand all what I was saying to him.

Couns: What do you mean by he took a ling time to understand?

Pol. Wit: He did not understand how to blow into the breatherliser.the accused couldn't blow as instructed.

Couns: Couldn't blow?

Pol. Wit: He didn't provide the machine with enough breath.

Couns: So he wasn't refusing to blow into the mouthpiece.

Pol. Wit: I don't remember saying so.

(note police witness's clever hostile response to Counsel's questions)

Case adjourned to 32nd August.

Tape 6 Side A case no. 20

Mag: Do you have anything to say accused?

Acc: Sir?

Interpreter: E tlaare ka di 9 tsa September o isiwe ko ngakeng e ya go go tlhatlhoba.

(on the 9th of September you will be taken to a doctor for examination)

Acc: Ngakeng ya eng?

(what doctor?)

Interpreter: Ngaka ya ba lwala tlhaloganyo

(a psychiatrist)

Acc: E rra

(yes Sir)

Interpreter: Jaaning go kopiwa gore o tswelle ka go emela tsheko o le mo kgolegelong. A go na le sengwe se o batlang go se bua?

(So you are requested to keep awaiting trial in prison. Is there anything you want to say?)

Acc: Nnaa rra ga seo

(No Sir. There is nothing)

Mag: Tell him to come on the 11th of March.

Acc: ... (inaudible but was pleading sickness while in prison)

Mag: And did you tell the prison officials?

Acc: E rra ke ba boleletse.

(Yes Sir, I told them)

Mag: and did they not help you?

Interpreter: A gagona kafa ba go thusitseng ka teng?

(**Interpreter:** Is there anyway they helped you?)

Acc: Nyaa , ga gona kafa ba nthusitsend ka teng.

(no there is no way they helped me.)

Mag: The prosecutor will tell them about you.

The rest of the tape taken up by mentions.

CROSS EXAMINATION

(The accused cross examines this witness)

Int: A go na le se o batlang go se botsa mosupi.

(Is there anything you want to ask the witness?)

Acc: Nne ke botsa mme a erile hela ke tswa ha circle(eng) ke bo ke tla ke lebagane le ene kanta ke ene erile a tswa mo circle(eng) ke be ke tla ke lebagane le ene kante ke ene erileatswa mo circle(eng) a ba a lebagana le koloi yaaka a ba a brika

(I want to ask this lady whether as I got out of the circle I was on her side of the road facing her or was it her who was out of her side and faced my car and the she braked?)

A QUARRELSOME CROSS EXAMINATION CONDUCTED IN SETSWANA, VERY RAPID SPEECH.

Acc: Ke botsa gore a erile fa otswa mo circle(eng) ob o labile ko.. kana wa tla o tlamalletse ko go nna //

Wit: Nyaaleke re re ne re setse re katogile circl^e rra

(**Acc:** I want to ask did you just getting out of the circle come straight for me ?

Wit: No we had already passed the circle sir)

Acc: Goraya gore ga o bue nete//

Wit: Nne ke le kgakala le ltsogo lanjta ke dule hela mo circle(eng) ke bo ke tlamalla.

(**Acc:** That means you are not telling the truth// **Wit:** I was just far away from the right side I just go out of the circle and drove straight on my side)

Acc: A oare ha o nthula on o sa bue le cell?

(Are you saying that when you hit me you were not speaking on your cellophone?)

Wit: Ee nne ke sa bue le cell)

(No I was nto speaking on the cell, I had left my cell at my shop)

Acc: O ne o e tlogetse ko dishopong?//ene e le ya ga Mr Marks Montshiwa. Mme o na//Rre yo ke ene o ne a tshotse cell)//Mme o ne a mme o ne a na le ene ke oheng?

(**Acc:** You had left it at the shops? **Wit:**It was Mr Marks M// **Acc:**The woman, the woman// **Wit:** Mr Marks had his cell//The woman you were with , who was she?

Wit: No we were only two.

Acc: Lo ne lo sena le mme ope?

(You were not with any woman?)

Wit: Ee re ne re le babedi fela. Mme o ke mmeditseng morago le gone otlile mapodisi a sena go tla ke o ke ne ke kgweetsa koloi ya gagwe,o tsile moragorago hela re ne re setse re na le mapodisi nne ke sena le mme ope nne ke na le rre yo hela re le two.

(No we were just two. The woman I called later and who came after the police had arrived is the one whose car I was driving, she came much much later I wasn't with any woman I was just with this gentleman)

Acc: Mme bangame le fa le ka... o ne o tshotse cell o bua le cell ha o tswa mo teng ga circle o ne wa bula cell

(but whatever you want to say you had a cellophone and you were talking into it.)

Wit: Nnyaa ga se boammaaruri, ke ne ke sa tshola cell, rre yo nne ke na le ene ke ene o ne a tshotse cell Ga keke ke bua mo celleng mo koloing ha ke kgweetsa rra.

(No , it is not the truth, I wasn't carrying a cellphone it's the gentle man a was with who was carrying his cell, my cell was at my shop I never speak on a cell when I am driving a car.)

Acc: Ke gore mma o bue boammaaruri//**Wit:** Ke bua boammaaruri **Acc:** O seka wa iphemela kannna, o seka wa iphemela ka nna, o bue boammaruri//**Wit:** Nyaa gake iphemele ka wena ntate ke bua se se diragetseng

(Please madam you must tell the truth//Wit: I am telling the truth //Acc: don't don't hide your faults behind me//Wit: No I am not hiding my fault behind you sir I am stating what happened.

CROSS EXAMINATION OF ACCUSED BY PROSECUTOR

(Still in the case no. 24 Moreetsi Sebetlela)

Pros: Are you saying you were By the police on the 20th of March 1999?

Int: A ware ka di 20 tsaga March 1999mapodisi nne ba ya ko le ne le thulanetse teng

Acc: Eerra

(Yes sir)

Pros: Ah ah did they test you?

Int: A bane ba go tlathloba?

Acc: Ee rra

Pros: Did you have the chance to see your results?

Int: O ne wa bona gore selekany sa maduoa a go tlathlobiwa ke bokae

Acc: Ee ba ne ba mpontsha.

Pros: Yes, after the accident did they give leave vehicle at the scene or they took it to the police station?

Int: ha le sena go nna le thulana koloi ya gago

CROSS-EXAMINATION by defense counsel Supplementary data

Def Couns: I am going to ask you a few questions so that what you have just said to the court is the truth as far as you know. Now , you said Thabang was knocked at the zebra crossing did you say it?

Wit: I don't understand the question.

Def Couns: Was he knocked at the zebra crossing or not?

Int: A o utwile sentle? O ne a le fa zebra crossing?

Wit: On a le (inaudible)

Def. Couns: Was Thabang knocked at the zebra crossing or not?

Wit: silence

Def.Couns: Yes or no, was was was he knocked at the zebra crossing or he was not knocked at the zebra crossing?

Wit: I didn't see.

Def. Couns: So when the car knocked him he was at the zebra crossing. So that if somebody could come and give evidence which says that eh Thabang was not knocked at the zebra crossing but away from the zebra crossing that information would be incorrect?

Int: Ha motho a kare ga aa thulelwa mo zebra crossing ao tlaa ba a bolella ruri kana nyaa?

Def Couns: Now, you said it was around nine o'clock at night

Wit: Go ne go na le dilighte go ne (inaudible)

(the street lights were on.)

Def Couns: But you just told this court that it was around nine o'clock.

Int: A kere mme o ntse obua gore e ne ele ka bo nine?

Wit: e ne e le ka bo five.

Def Couns: So it was not nine o'clock.

Int: ene e se nine?

Def Couns: So you don't know what time it was?

Wit: inaudible

Def Couns: Do you know what time it was?

Wit: Nne ke sa tsaya nako nne ke tsaya gore nako ya

(I didn't have a watch I just thought the time might be ...

Def Couns: Was it dark? This accident happened during the night or the day?

Wit: E ne e le bosigo.

(It was at night)

Def Couns: So was it dark?

Wit: Nne gole nne gole dilighte nne di tshubile

(the street lights were on.)

Def Couns: It was clear?

Wit: silence

Def Couns: So you said when you came to the zebra crossing there were some other people who were with you.

Wit: Ee

(Yes)

Def Couns: Now did you cross with those people?

Wit: inaudible

Def Couns: But did you cross with those people?

Wit: silence

Def Couns: Now you said that eh the cars were the car the cars were stationary, the cars from the south were stationary. Is that correct?

Wit: Ee.

Def Couns: And even after you after you crossed they were still stationary.

Wit: Ee (yes)

Def Couns: And when Thabang crossed tried to cross the zebra crossing, they were still stationary. How far was Thabang behind you?

Wit: Nars nna a resetse morago ga rona.

(He was behind us)

Def Couns: Because you see what you are suggesting to this court is this you are putting a scenario in which Thabang was behind but you came to the zebra crossing you couldn't wait for Thabang so Thabang was so close but you couldn't wait for him the cars were stationary you crossed the road and you walked for two metres whilst Thabang was still behind. So how far exactly how far was Thabang behind?

Wit: O ne a le 1.5 mtertes

(He was about 1.5 metres behind)

Def Couns: So in other words Thabang was with you because he was 1.5 do you know how far 1.5 metres is? Direct this court how far 1.5 metres is.

Wit: demonstrates

Def Couns: So in other words Thabang was with you.

Wit: Nne re nne re kgaoganye

(We were separated)

Int: O na a na le lona?

(was he with you?)

Wit: O ne al ko botsheo.

(He was on the other side)

Def Couns: Now earlier on you stated to this court that you crossed with the people you were with, Nthabiseng, you crossed the road and Thabang remained behind. How do you explain that with the 1.5metres?

Wit: Ke raya gore nna ale ko morago ga rona.

(I mean he was behind us)

Def Couns: So are you trying to suggest to this court that you crossed the zebra crossing and Thabang as you were crossing the zebra crossing he was also crossing or you are trying to suggest to this court that you crossed the zebra crossing and Thabang came behind you after you had crossed? Which one is which one is which is which you crossed first and Thabang tried to cross or when you were crossing both of you were crossing the zebra crossing and Thabang was still 1.5 metres

(The witness interrupts but inaudible)

Def Couns: Now you stated to this court earlier on that that after you had crossed the road you walked for two metres away from the zebra crossing and then when you were two metres away from the zebra crossing you saw an ambulance coming now at this point where was Thabang?

Wit: Thabang o ne a o ne a re setse morago.

Def Couns: Exactly was he was he at the edge of the road about to cross to your side or he was still on the middle of the road?

Wit: O ne a kgabanya

Def Couns: Where was he?

Int: A o ne tswetse ko ntle ga tsela kampo a le ko bohelong ja tsela kante a le ha gare?

Wit: O ne ale mo gare ga tsela mme (inaudible) #

Def Cons: Where exactly was he on the road was he eh on the other side towards the edge or was he in the middle or was he on the edge of the road . you said he was on 1.5 behind you where exactly was he on the road.

Wit: O ne a le motseleng

Def Couns: You said Thabang was 1.5 metres away from you and you even gave the court the direction now you also gave evidence to this court that you crossed the road and then you walked for two metres and that is when you saw an ambulance, you get the sequence? You crossed the road, Thabang was 1.5 metres behind you walked for two metres and that's when you saw the ambulance, is that what you said to the court earlier on?

Int: Oa re Thabang o ne a le setse morago ka 1.5 metres

Wit: Ee

(Yes.)

Def Couns: How far was the ambulance when you saw him?

Wit: Nne e se kgakala e ne e le guafi hela.

He wasn't far it was just near.)

Def Couns: So you only saw the ambulance when it was close to you?

Wit: Ee.

(Yes)

Def Couns: Was the ambulance coming from behind or it was coming facing you?

Int: E ne e tswa ko morago kana e ne e lebaganye le lona>

Wit: E ne e lebaganye le rona.

(It was facing us.)

Def Couns: And Thabang was behind you. Which side were you facing? Were you looking at the zebra crossing or you were facing the road.

Wit: We were facing this side the north side.

Def Couns: You were facing the north side and the zebra crossing was behind.

Wit: Yes.

Def Couns: So will I be correct if I say that you were facing where you were going will I be correct?

Int: Nne le lebeletse ko le yang teng?

Wit: nne re lebeltse

(We were facing//

Def Couns: I put it to you that you did not see what happened behind.

Int: Ga o a bona se se neng se diragala ko morago ga lona?

Def Couns: because you were facing where you were going.

Wit: Ke ne ke lebeletse ko ke yang teng mme erile ha e mo thula nne re salebelela ka matlho

(We were facing where we were going but when it hit him we were not looking.)

Def Couns: So will I be correct if I say that you did not see what happened at the zebra crossing and at the scene of the impact because you were facing where you were going will I be correct.

Wit: Ke ne ke lebile teng.

(I was looking there)

Def Couns: (Emphatic) Will I be correct? You have just stated to this court that you were facing where you were going and as such I am putting it to you that you couldn't see what was happening behind will I be correct?

Wit: Ka re ga ke a bona koloi ha e mo thulake utlwile erile ha e setse e mo thula ha e thunya ke gone ha ke labella ke be ke hitlhela gore o setse a le mo koloing.

(I said I did not see the car when it hit him when it hit him when it banges it was when I looked and I found that it had hit him.)

Def Couns: I'm not I'm not asking you about (inaudible) Will I be correct if I say you did not see up until the impact you did not see what happened. Will I be correct? Yes Or No?

Wit: Ke ne leka go se tlhalosa

(I was trying to explain...)

Def Couns: Did you wait for Thabang? Did you really wait for Thabang or you are lying to this court? Does it make sense to you? You were with a child a minor child you crossed the road and walked for two metres when the child had not even even crossed at that point. When you first saw the ambulance the child had not crossed.

Wit: Tries a long explanation, which is ignored when the counsel is inexhorably insisting on his own version of the story

Tape no. 3 Case number 3 CROSS-EXAMINATION 2000-01-12

Def Couns: Now you have described to this court eloquently as to how the accident happened would I be right if I say that when the car moved out of the road you couldn't clearly see as to what the cause was.

PW: I couldn't see clearly what was there.

Def Couns: Yes because there was another car in front of you.

PW: Yes I couldn't clearly see what caused the driver...

Def Couns: Now, for how long were you following the accused?

PW: I followed the vehicle which was following the accused as I indicated along Lemmenyane road.

Def Couns: Yes, for how long.

PW: It was a queue of motor vehicles//**Def Couns:** How long were you following the accused person.

PW: I wouldn't exactly tell you for how long because//**Def Couns:** Was it for two minutes? a minute five minutes three// What I described to this court earlier on//**Def Couns:** I'm asking you eh Mr Sengwaketse for how long were you following the accused person.

PW: What I'm saying is I can't because there were some other vehicles which turned left.

Def Couns: You don't know how long you were following the accused.

PW: I only saw the vehicle when it was turning to the right.

Def Couns: That's when you saw the vehicle it was in front of you.

PW: Yes

Def Couns: So you might have been following it...

Def Couns: Now, all the way up to when the cars in front of you... did you see any other, anything that is unusual in the traffic?

PW: No.

Def Couns: You didn't. So the only unusual thing that you saw in the traffic was the hitting of the no stopping sign?

PW: Yes

Def Couns: Was there any disturbance from the other traffic? Now about the no stopping sign did he run over it? Literally run over it?

PW: I... he hit it on the side.

Def Couns: Oh he hit it on the side. He didn't run over it. Anybody injured?

PW: There was nobody.

Def Couns: Now, when he swerved out of the road as you eloquently described eh when his vehicle went out of the road, hit the no stop sign and faced Taung BHC houses and later came into joined the road and started accelerating were you in front or still behind?

PW: I was had kept on the side.

Def Couns: Okay. There was no other car

PW: There were some cars...

Def Couns: You said you didn't have any ... there was no disturbance of traffic at that point?

PW: As soon as I stopped ... (inaudible)

Def Couns: So he joined the road without causing any disturbance or any hazard.

PW: There wasn't any Vehicle coming.

Def Couns: So he joined the road without causing any hazard.

PW: Yes.

Long repetitive stretch of q & a, then

PW: What I'm here for is to tell the court the truth. The vehicle got out of the road hit the sign turned

Def Couns: I'm not interested in the turning... Now, you gave the evidence about one of the observations you made that gave you the suspicion that he

was drunk. You said you saw when you looked at him as he was talking to you you saw eh blood spots in his eyes, his eyes were red.

PW: Yes.

Def Couns: I put it to you that his eyes have those blood shot that you have been talking about. Can you dipute that?

PW: Yes

Def Couns: It was your first time to see him.

PW: That was my first time to see the accused.

Def Couns: Yes. Yo u didn't know him.

PW: I didn't know him. (in a despairing tone of voice)

Def: Couns: You wouldn't say that those blood shots are his normal appearance.

PW: No.

Def Couns: Now if somebody according to you if somebody has the blood shots in the eyes he's drunk?

PW: silence

Def Couns: He's drunk.

PW: No.

Def Couns: If I say to you blood shots in the eyes can be caused by other factors except alcohol would you dispute that? Alcohol is not the only thing which can cause bloodshots would you dispute that?

PW: Yes I wouold dispute that.

Def Couns: Why?

PW: silince

Def Couns: Take a closer look at the accused person. Are his eyes red

PW: Yes they are.

Def Couns: They are. Does this suggest that he is drunk?

PW: No.

Def Couns: Now, you you talked about the accused person refusing to give his breath specimen. Did you have a breathaliser then when you asked for his specimen.

PW: I asked // Def Couns: When you asked him did you ever ask him to give a specimen?

Def Couns: You never. So he never refused as far as you are concerned, you, Mr...he never refused to give you his breath specimen.

PW: Yes.

Def Couns: Because you never asked him. ...But you you have just were just giving us evidence about what you heard Montshosi saying or you heard one of the officers saying that the accused had refused when you came back from court you heard that he refused to take a breathaliser test is that correct?

PW: Yes.

Def Couns: Do you know by any chance as to where... were the machines there at Broadhurst?

PW: (inaudible)

Def Couns: So you don't know what happened during.. since you were in court?

PW: Yes.

Def Couns: So you can't attest to anything that happened in you absence?

PW: No

Def Couns: So if I put it to you that eh he went they took him to Broadhurst Police Station Can you dispute it.

PW: I wouldn't dispute it.

Def Couns: If I put it to you that the fact that he has not taken the test was because there were no machines at the Broadhurst Police Station would you dispute it?

PW: No I wouldn't.

Def Couns: You Wouldn't. Do you remember exactly what constable Montshosi said?

PW: Everything that he said?

PW: silence he told the accused his rights.

Def Couns: What did he say?

Retracing the whole ground covered by the examination in chief and bringing the 'eloquent' narration into doubt.

APPENDIX 4

DEFENSE COUNSEL SUBMISSION

Tape No.7 Case No. 21 DEFENSE COUNSEL SUBMISSION

State versus Doctor Tshetlhane.

Couns: Your worship we take this opportunity to advice the court that the defense is not calling any witnesses and I will accordingly proceed to close this case.

Pros: Your Worship pleasing we would like to proceed with final submissions in respect with this matter.

Notes Negotiation moves.

Mag: Now do we not begin with the prosecution?

Counsel : As your worship pleases.

Pros: I refer to my last final submission, Your worship.

Mag: Proceed.

Counsel: Your Worship eh the state in this matter had filed a charge of driving a motor vehicle whilst unfit against the accused person. On the fateful day being the 24th of January 1998 before noon when the defense wondered, why as stated, the two witness PW 1 and PW 2 for the state had mounted a roadblock had changed ... (inaudible) This would appear to have been a routine inspection of drivers and their respective motor vehicles. It appears that there was no particular or specific reason to have stopped the accused as he was not alleged to have contravened any of the traffic regulations Your worship it appears according to their evidence the motor vehicle was checked and the nature of the evidence in support the state has been improper has been (inaudible) is that the smell of alcohol was detected from his breath and he was instructed accordingly to be breath tested. His readings are stated Your Worship to be was that in terms of the Sd2 his reading was 0.50 mg per a litre of breath and that in terms of the printout which was derived from the lion intoxiliser 1400 his reading was 0.461 mg per a litre of breath and it appears that (... inaudible)

Your Worship we submit with respect that pursuant to the objection, the evidence of the calibration of the machine was thought to be... in the form of the certificate of calibration. However Your Worship, we'd like to submit that the effect of the successful objection to the production of the certificate is to cast serious doubt on the result of the printout because the particular certificate was meant to say that the machine was properly calibrated and I'd like to submit with respect Your Worship that in the absence of that certificate in the circumstances of the present case there is no other evidence or sufficient evidence upon which this honourable court can be called upon to pronounce positively the results of.... With respect Your Worship, the person who was supposed to produce the certificate... (inaudible) nor the person who calibrated the machine let alone to say he doesn't know the

workings of the intoxiliser. The long and short of this submission Your Worship with respect is to say that this person is not an expert in the workings of this machine. Therefore his evidence as to what the condition of the machine must be taken with a pinch of salt. This becomes even more apparent when one looks at the manner in which the reported answers to the questions which he has been asked in cross examination as to how he could say to the court that machine was functioning properly. In his response Your Worship to cross examination he said that when he switched on the machine it said diagnostics OK that can be read by any layman... (inaudible) I formed the impression well that when he was further asked Your Worship what diagnostics actually means he confessed to the court that he doesn't know exactly what it means. Now Your Worship, with respect the question is now to what extent can we rely on his knowledge of the workings of the machine. The question posed again is to what extent can we rely on his knowledge when he owns up to the court that certain feature of the machine which was displayed he does not understand. I submit to this court, Your Worship that the admission he does not understand what the word diagnostics mean telling a ... (inaudible) With respect Your Worship the witness is not trained to use the machine. He probably was just shown in three minutes that when you operate the machine this is what you do. If that be the case any layman is in a position to operate the machine. Certainly not. Can we then rely on his evidence when he comes to court? This officer who sought to tender the certificate was not in a position to tell the court about the margin of error of this machine. That being the case, Your Worship, we submit with respect, that it means two things. First, the extent of his knowledge as far as this machine is concerned is dismally limited. The second point, Your Worship, is that he does not know the margin of error. He was not in a position to make an allowance of that margin of error when he tested the accused. Your Worship, I submit with respect all these salient points would put into question the results. We submit with respect the following points are worthy of note in determining the... Firstly, the Sd2 showed a reading of 0.50 mg per litre. That reading Your Worship with respect was different from the reading of the Lion intoxiliser intoxiliser. Your Worship with respect the honourable court has not been favoured with an explanation of for the discrepancy. It is therefore is left to travel on a speculative road to the cause of the discrepancy. When he was asked as to whether the Sd2 had been calibrated and working properly he said he had never seen the certificate of calibration. He could not testify before the court the proper functioning of the machine. No provision for the margin of error made by the operator at the material time. Let me summarise, Your Worship, by making reference to the case of Keebine and the state.. It being a case cited in the 1988 Botswana law report at page 102, judgement of the honourable judge the late... (inaudible). This statement is apposite to this case when he was dealing, Your Worship, with issues like traffic.

'It is known for them to behave erratically which is not surprising in view of the fact that they are mechanically operated. It must be a matter of common knowledge that mechanically or electronically operated devices can fail or malfunction for a variety of reasons known or unknown to the user. It is therefore dangerous for any judgement to conclude that any mechanically

operated ... will always operate to their... all the time. And it is even more dangerous to make an assumption a judicial precedent. Especially those involving the liberty of...'

Your Worship I submit with respect that this statement is apposite to the current case and that much as it is related to traffic it relates also to the electronic device...

DEFENSE COUNSEL SUBMISSION 2000-01-27

Your Worship ehm the case my learned colleague the prosecutor refers to is one in which there was clearly an abuse of process and it is noted in the judgment thereof of Nuny Jay that there was a substantial departure in the fundamental character of the cause to trial. Your Worship, in the case before us at present the accused person is a lay person and is not aware of the technicalities pertaining to and arising from the conducting of his own defence as such he has sought legal counsel. It is pertinent to note that only one witness is being called by the prosecution. It is his testimony only this court is to consider. However Your Worship there are vital elements of the offence in question which require an insight of cross-examination to ensure that the ends of justice are met in a free fair and equitable manner. This can only be done on the recall of the state witness. It is for the court to decide and invoke its discretion as to whether or not the recall of the witness would meet the ends of justice or frustrate the ends of justice. I am humbly submitting, Your Worship, that this is a proper case for the recall of PW 1 and that this can only go to meet the ends of justice Thank you Your Worship.

The witness was recalled. But the magistrate's brief speech was inaudible.-

SUBMISSION BY PROSECUTOR.

Case number 24

Tape number 10

Mag: Yes.

Pros: Your Worship I wish to submit that the state has proved its case beyond reasonable doubt. Your Worship, there is no doubt that the accused was involved in an accident on the 20th of March and there is no doubt that that the police attended the accident upon which the accused was subjected to the alcohol test. There is no doubt that the results were in excess of the prescribed limit. On the second count, Your Worship, there is no doubt that the accused person drove the motor vehicle BX975544 .There is no doubt that he was again subjected to the alcohol test.and his results still beyond the prescribed limit. There is no doubt that the machine used was in working order and there is no doubt that the accused person was warned of his rights. With that your warship, we submit that the evidence adduced was sufficient enough to render reasonable to convict that the accused person be convicted as charged.

Mag: Anything to say accused?

Acc: in setswana) There is nothing to say except to ask for forgiveness from the court.

Mag: Judgement on the 20th of August. You will remain in bail.

PROSECUTION SUBMISSION Tape no. 9 27-01-2000

The date of mention was set for the 5th of January this year. Then on the 5th of January the matter was mentioned and another date was set for the 10th of January this year due to the fact that Your Worship was not in and on the day which is the 10th of January the accused did not appear a warrant was issued for his arrest, on the 11th he was mentioned before Your Worship and on that particular day a date of trial was set for today in the morning, Your Worship so the trial commenced as scheduled. Your Worship after the trial commenced prosecution indicated its intention to proceed even the accused was asked if he was still maintaining a plea of not guilty. So during the course of the trial when the accused was asked to comment on the exhibits it was when he indicated that he had got a defense counsel now one might ask himself or herself as to why did the accused only indicate that he has a defense counsel at this stage of the case even the defense counsel here indicates he was only instructed this afternoon so one might think the accused is trying to evade the ends of justice. Your Worship with the court's permission I would like to refer Your Worship to a case of Moffat Kelebonye Sekalale 1997 to 1993 Rbm r79 that is it indicates that it is undoubtedly true that under section 197 of.. a witness who has given evidence may be recalled and re-examined by the court; this is a discretionary power which may not be used in such a manner as to perpetrate a radical departure from the established form of a criminal trial. It continues the 'the case of Dora Harris suggest that the the court's discretion should not be exercised where the prosecution could have no right so to do. Now I'm referring this court to this case due to the fact that eh as a prosecutor on behalf of the state, I feel it would not be justice for me to recall my witness and if this court permits with this information I apply that my witnesses should not be recalled to come and testify thank you Your Worship.

APPENDIX 5

JUDGEMENTS

Tape No. Case. No 22 15-08-99

State versus C. A.

Couns: I appear for the accused, Your Worship. The accused person says he has some problems in getting transport from Mapharangwane,

Pro: I appear for the state Your Worship. The case is for judgement.

Mag: The accused person is said to have on the 2nd of April 1999, along the road from Francistown at Mmamashia, been involved in a road accident...

The alcohol concentration in his breath measured 3.1 mg per litre of breath.

And on a second count the accused on the 2nd of April this year about 11.30 am came driving a Toyota Cressida registered B... failed to stop at a police roadblock at Mmamashia. Among the officers manning the roadblock was He was the one talking to the accused to ask him for a road licence sensed a strong smell of alcohol in his breath. He told the accused of his suspicion that he may have been driving whilst unfit due to consumption of alcohol. ... The machine print out (inaudibly) He however was not sure whether the machine was in very good working order.... The accused was tested using the alcometre. The readings were above the prescribed limit. The accused admits having been advised of his rights when he was tested. The only issue seems to relate to the reliability of the machine. The certificate of calibration was rejected by this court on the basis that it was hearsay.

However, in the case of Dennis Pilane... I do not see how this cannot be hearsay. On the other hand I do not believe the statement by defense counsel that the machine was... to be hearsay. I believe that the witness had firsthand information and can testify. The same applies, I believe, to the question of whether the machine could have been working well if whoever is... need not be a technician. Anybody who has some knowledge accumulated over some period of weeks of using the machine can tell whether it is in working order. The officer therefore acquired the expertise. ... Therefore there is an element of doubt as to whether there was... The second test was a reliable one. I therefore find that the state has failed to state its case beyond reasonable doubt. Therefore the accused is acquitted and discharged.

NOTES see green note book of readings at the back) this is for pages 19-22. Moreetsi Sebetlela.

Tape number 16 JUDGEMENT

The witness said in his evidence that the ... (inaudible) and he flicked his lights signalling it to stop. However that vehicle did not stop. Sergeant PW 2 Sergeant.. they chased and caught up with the offending vehicle at another set of traffic lights. PW2 ordered the driver of the vehicle to go back to where the two officers first saw him. At which place the driver was cautioned and then charged by PW3 sub-inspector Machona. At the close of the state

case after his rights and options were clearly and carefully explained to the accused person they elected to have it closed and called no other witness. With regard to count one the accused person said that when he entered Lobatse Road, the lights were green. With regard to count two the accused says that he did in fact see PW1 but he unfortunately there was no way he could stop as he was on a high way and it was a no stopping zone. Now of the three prosecution witnesses PW1 said Sergeant Makhobo who testified to the accused a vehicle the lights ... When he was asked how he was able to say that the accused drove against the lights he said that he was in the line of vision of the traffic light along the Lobatse road and that those lights were green and that then he took it that those regulating the traffic the must have been red in other words he deduced from the colour of the lights along Old Lobatse Road that the colour lamps regulating the... must be road. However I must say that the traffic authorities both in Botswana and other jurisdictions that one is not... Inaudible) He says and I quote 'If the prosecution in which the accused did not intend to stop at a traffic light the cop is not entitled to assume that when the light in the face of the road facing one direction is green the light indication of the road at right angle to the former is red. For authority of this point in this jurisdiction one would be advised to look at the case of (inaudible) of the Botswana Law Report 1988 at page one hundred and two. It is therefore clear on the prosecution cannot ... (inaudible). With regard to count two .. PW1 says he signalled to the accused to stop but the accused did not fail to stop. However the accused admits that he in fact saw PW1 and did notice that he was waiving him to stop. He himself admits that he did not comply with the officer's direction. He offers his justification for the failure to comply as that there was no suitable stop as he was driving on a high way. In my view however the reason given by the accused person for non compliance with the officer's direction is not in fact does not reflect the charge against him. If I may quote from Cooper again, but this time at page 471 he says and I quote 'The driver of a vehicle on a ... road must stop at the side on direction given by a police officer in uniform.' In my view a police officer signal takes precedence over all other road signs... (inaudible) such a motorist must ignore the road signs and comply with the police officer's signal. Similarly therefore, where a motorist such as the accused has been commanded by a police officer in uniform to stop he must stop irrespective of whether the high way or whether there is no stopping or no parking. In conclusion and out of the boundaries of both I will say that the accused is found not guilty in regard to count one and is acquitted and discharged but is found guilty on count two and is convicted thereof.

APPENDIX 6

READING OF FACTS

Case no.27 tape no 11 26-08-99

State versus K.M. (housebreaking.)

Pros: I am ready with the facts Your Worship.

The accused is as named in the charge sheet. He is charged with two counts of breaking and stealing in the house. The complainant Helen Seikanyang resides at house number 20439 Phase Two, Gaborone. On the evening of the 17th she accompanied her younger sister to their home in Kanye. They came back on the 18th July 1999 in the evening. On arrival she noticed that the kitchen lock had been broken. She then suspected that someone may have broken into their house in her absence. She then started her observations within the house. She realised that her property already exhibited in the charge sheet, had been stolen. She went to report the matter to the Gaborone West Police Station who investigated. On the 13th Of August the investigating officer Inspector Kudumane was given those properties and the accused by Sergeant Modupe. When the accused was confronted with the allegation he admitted that he broke into the lady's house and stole the property. He was then charged as charged and we tender the goods as evidence.

Mag: Is that true accused? On the 13th of July you went to Gaborone West? You broke the kitchen lock and entered the house with the intention to steal?

READINGS OF FACTS

Tape Number 2

Case No 16. 06-08-99

State versus B.P.

Pros: Your worship I am Inspector Montshiwa appearing for the state in this matter. The matter has been set for facts reading today.

Mag: You will remember that on the second of this month, you pleaded guilty to several counts....

Int: Setswana: O gakologelwa gore erile ka di 2 tsa kgwedi yone ena o ne wa ipona molato mo melatong ele mokawanyana ya tsela.

Mag: driving a car dangerously,

Int: O ipone molato mo go kgweetseng koloi ka mokgwa oo diphatsa.

Mag: secondly, driving without a drivers licence.

Int: Wa bobedi wa go kgweetsa o sena setlankana.

Mag: thirdly driving without due care as well as driving without a valid drivers licence.

Int: Le wa go kgweetsa o sena kelelelo.

Mag: You remember you pleaded guilty to the charges? Do you still plead guilty to the charges?

Int: O gakologelwa gore one wa ipona molato?

Acc: Yes.

Int: Le tsatsi leno ontse o ipona molato?

Acc: Yes.

Mag: Alright, listen then very carefully to the reading of the facts of the case.

Int: O reetse ka kelelelo.

Pros: The accused person is a citizen of Botswana, residing at house number 23901 Phase 4, Gaborone West.

Interpretation: Gatwe o monni wa lefatshe la Botswana onna ko ntlung ya nomoro ya 23091 Phase 4 Gaborone West.

Pros: On the thirteenth day of November 1998 at around 8.00 hours, No.11055 Constable Sechoni, received a report to the effect that there was a accident involving two motor vehicles.

Interpretation: Ka di thirteen tsaga November 1998 ka bo eight, Constable Sechoni one a begelwa gore gona le kotsi ee amang dikoloi tse pedi.

Pros: Constable Sechoni then proceeded to the scene of the accident which was Gaborone –Tlokweng road near Game Discount shopping centre.

Interpretation: ene rre Sechoni a ba a ya ko, kotsing ee diragetseng teng ko tseleng ya Gaborone /Tlokweng go bapa le dishopo tsa Gaimi.

Pros: On his arrival Constable Sechoni found that those motro vehicle were B43ADK Maribe Many..Kgomotso of House No. 23796 Gaborone W4st Phase 4.

Interpretation: ngwe ya dikoloi tseo ele ya B 342ADK, ele ya ga Maribe Kgomotso.

Pros : This motor vehicle was from the west to the east and B428 AAI which was driven by Kawali Richard of Nkaikela ward in Tlokweng village and the said motor vehicle was from the east to the west.

Iterpretaion: gatwe dikoloi tseo enngwe ene ele ya B428AAI, ya ga Kawale Richard, wa Nkaikela ko Tlokweng di ne di hapaana.

Pros: In his investigation Constable Sechoni found that the accident was caused by the accused person who was driving a public service motor vehicle B567Aan.

Interpretaion: Sechoni o tswa go tlhothomisa a ba a bona gorekotsi e bakilwe ke wena one o kgweetsa koloi ya B567AANye e rwalang sechaba.

Pros: The said public service motor vehicle was driving from the westward direction to the eastern direction, being followed by B428AAI and followed by other motor vehicles which were from the east and many other motor vehiclesd behind B248AAI.

Interpretation: Gatwe yone koloi ye e rwalang sechaba e ene e salane morago le ya B428AAI ee e neng e setswe marago ke tse dingwe.

Pro: B324AEK was the one in front of the other motor vehicle which were driving from the opposite direction. The accused person when he reached the bus stop in front of Game, saw people standing there but being on the southern side of the said road.

Interpretation: Gatwe ya B342AAK ke yone ene ele fapele ga tse dine di tswa ka fa lebogong le le lengwe mme fa o tsena fa go emang di bus gone fa Game, obo o bona batho ba eme motseleng go bapa le tsela yone eo

Pros: As he saw those people, the accused without any warning, and on the road with a solid barrier line, and a painted island, which did not permit him to turn to the right, or cross the solid line, made a U turn when the oncoming traffic was too near.

Interpretation: Gatwe wena erile o bona batho bone bao o bo o sa fe babangwe ba bangwe ba go ba tsibosa gore o a corna obo o corna hela ka tsela ee diphatsa mo tseleng eeleng gore ena le gona le moradi o mosweu oosa letleleleng gore motho o ka corna teng.

Pros: As a result of his dangerous way manner of driving, to other persons the driver of B342AEK who was being followed by other vehicles swerved his motor vehicle to the right as on the left there were people who were standing at the bus stop.

Interpretation: Gatwe mokgweetsi wa koloi ya B428AAK yo oneng a setswe morago ke dikoloi tse dingwe on a siela ka ha letsogong la moja ka gore ko go la molema on a one o tshaba batho ba ba neng ba eme fa stopong.

Pros: And as a result collided with B428AAI which were following B567AAN as there was no way in which the driver of B567AAN could do to run away from being knocked by B532AEK and he was forced to apply sudden brakes by the dangerous manner of driving which which was displayed by the accused.

Interpretation: Gatwe a ba a thulana le koloi ya B428AAI eene e setswe morago ke ya B567AAN ka gore gone go sena kafa mokgweetsi was B428AAI a k sielang teng atshaba go thulwa ke wa B342ADK. ke gore one a patelediwa ke go kgweetsa ga gago mo go diphatsa gore a brike ka bonako.

Pros: After the two motor vehicles collided, the accused just drove away without even giving any help to the occupants of the two motor vehicles.

Interpretation: Erile di sena go thulana gatwe wena obo o tswa o tsamaya o sa ba thuse.

Pros: The accused was arrested on the 26th day of November 1998 at the taxi rank No longer driving the motor vehicle which he was driving the motor vehicle which he was driving at the time of the accident.

Int: Gatwe o tswherwe ka di 26 tsaga November 98 Osatlhople o kgeetsa koloi e oneng oe kgweetsa ka letsatsi la kotsi.

Pros: After his arrest a statement was recorded from him by constable Sechoni and he demanded his driving licence and he the accused person seemed to be not a holder of a driving licence.

Int: Constable Sechoni yo oneng a go tshwara a ba a tsaya a ya go kwala polelo mo go wena. A be a batla setlankana sa go kgweetsa mogo wena abo o re gaseyo.

Pros: Constable Sechoni then warned and cautioned him for the charges of driving a motor vehicle which is a public service motor vehicle in a dangerous manner to other persons and of driving a motor vehicle without a driving licence.

Int: a ba a go lebisa melato ya go kgweetsa koloi ee rwalang sechaba ka tsela ee diphatsa le go kgweetsa o sena setlankana.

Pros: After that the accused person was nowhere to be seen.

Int: Go tswa foo o bo o satlhowe o bonwa.

Pros: On the 25th of January 1999, the accused was driving a public service vehicle registration number B847AAB at old Gaborone taxi rank along

mmaraka road. And when he got at the pedestrian crossing he found a pedestrian already at the zebra crossing.

Int: ka di 25 tsaga January 1999, one o kgweetysa koloi ee rwalang sechaba ya di nnomoro tsa B847AAB ko go emang di taxi. obo o itlhela motsamaya ka dinao a tlola tsela.

Pros: The accused failed to stop to give the pedestrian chance to cross.

Int: O bo o palelwa ke go ema go fa motsamaya ka dinao yoo sebaka sa go tlola.

Pros: The name of that pedestrian was Leina Popi.

Int: Leina la motsamaya ka dinao yoo ene ele Liena Popi>

Pros: The accident was attended to by no.669 Constable _Ditshupo who was a sergeant by then. In his investigations he found out that the accused person had no valid drivers licence

Int: Rre Ditshupoaitlhela ele gore ga o na setlankana sa go kgweetsa

Pros: In this matter that accused was using the name Emmanuel Makgetsi.

Int: Ga twe one o ipitsa Emmanuel Makgetsi.

Pros: he was then warned and cautioned for driving a public service vehicle without due care and attention and without a driving licence.

Int:

Pros: AS time went on police officers noticed that the accused person was the same person who was driving B567Aan on the thirteenth day of November 1998 and was the one who caused the said accident.

Sergeant Ditsghupo then warned and cautioned him for the charges as now charged.

Mag: Have you heard the facts of the case?

Int: A o utlwile mabaka a molato?

Mag: Are they true?

Int: Ke boammaaruri?

Mag: And more specifically, isw it correct that on the 13th of November 1998 you drove a motor vihecle registered B567AAN in a dangerous manner?

Int:

Mag: And is it correct that on that particular day you did not have a valid drivers licence? And is it correct that on the 26th of January this year you drove B847AAB carelessly? Is there anything you want to say before the judgement?

Acc: Mo melatong yotlhe e ke e lebisitsweng nne ke kopa maitshwarelo.

Mag: Why, why do people drive without drivers' licences? (in a plaintive tone of voice)

Int: Ke eng o no o kgweetsa o sena licence?

Mag: Your judgement will be delivered on the 18th of August and you will await it in prison.

Tape number 12 Case Number 31 State versus K.B.

READING OF FACTS

Mag: You will recall that on the 10th of August you pleaded guilty to driving a public service motor vehicle without due care and attention in count one and driving a public service motor vehicle without a public service lecence?

Acc: Ee rra.

(Yes sir(

Mag: Now lets get t to the circumstances under which the offences were committed. Now listen carefully to the reading of the facts because at the end you will be asked if you agree.

Interpretation.

Acc: Ee rra.

(Yes Sir.)

Pros: The facts of the case state versus Keebine Boikanyo. The accused is charged with two counts of driving a public service motor vehicle without due care and attention and driving a public service motor vehicle without a public service motor vehicle licence. On the 4th of August 1999 the accused was driving a public service vehicle bearing the numbers B774ACF along the Mogoditshane Road. The accused person was carrying passengers. A road traffic accident occurred immediately in front of the accused person's vehicle when a two trucks collided. The accused person who was driving close to the trucks swerved his motor vehicle to the left side and hit a pole alongside the road. The police were called to the scene of the accident. Some measurements and drawings were made. Police investigations revealed that the accused person failed to keep a reasonable distance between his motor vehicle and the other truck which was ahead of him and when he avoiding the truck he swerved to the left and hit the pole. No passengers were injured during the accident, hence the charge of driving a public service vehicle without due care. The second count a public service motor vehicle licebce was demande from the accused person on that particular day. He failed to produce the licence because he is not a holder of such a licence.He was accordingly warned and cautioned about the charges.

Mag:... count number one.. and I would find him not guilty by his plea.Count number one.I

Mag: Is correct that on the 4th of August you were dring the vehicle numbered B744ACI a public service and is it correct that on that day you were involved in an accident and is it correct as on that day you were not a holder of a licence to drive a public service vehicle

Pros: Your worship I would request the in relation to count two another date of mention be set so as to asses the evidence so that we could come up with a better.

READING OF FACTS

Tape Number 12 03-09-99 State versus S. M.

Pros: Your Worship I appear for the state the matter is for facts reading.

Mag: Proceed.

Pros: On the 28th day of ...99 the accused drove a vehicle with the registration number B772AATon the Tlokweng road near Zamalek was stopped at a roadblock which wasmounted for the purpose of checking drivers licences. The driver introduced herself as S. M. of ward... in Tlokweng. During the conversation with sergeant ... he sensed a smell of alcohol on her breath and he warned her about his suspicion that the accused was driving under the influence of alcohol. The accused was then transmitted to Naledi Police Station where she was tested with the use of the Lion Intoxiliser 1400. The results produced by the machine showed that the alcohol content of her breath measured 0.614m l in one litre of breath,

thereby exceeding the prescribed limit of 0.35. The accused was warned for a charge as in the charge sheet. The printout from the machine was shown to the accused person.

Mag: What's her status?

Pros: She is a first offender Your Worship. **Mag:** Anything to say in mitigation accused?

Acc: I have no parents and am the sole supporter of my brothers and sisters.

Mag: The legislation provides for a maximum of P1000 or twelve months in prison and withdrawal of drivers licence for two years.

READING OF FACTS (from supplementary data)

Pros: State versus K. G. The accused person whose name is named in the charge sheet//**Int:** O utlwa sekgoa (Do you understand English?)

Pros: On the 23rd day of may 1998 the police received information from reliable sources that the accused person was possessing a pistol-like object. They therefore traced the accused person. The accused person was subsequently arrested at plot number 9873 in Jinja location. On search a 9mm barrel pistol was retrieved from him. The same pistol was later sent to the Botswana Defence Force for inspection and identification. After the inspection the pistol found to be a fire arm. Investigations later revealed that the accused person did not posses a licence for that pistol. The 9mm barel pistol is produced befor court as an exhibition. Count two after the arrest of the accused person on the 23rd day of May 1998 it was found that the 9mm barrel pistol was loaded with four rounds of ammunition. The ammunitions were also taken to the Botswana Defence Force and the armament technician produced an affidafit on how he conducted the inspection. The accused person did not have a licence to posses such ammunition. He was later cautioned for the charges as they appear on the charge sheet.

Tape no. 7 case no. 5 Ikalnga interpretation.

APPENDIX 7

READING OF CHARGE SHEET

Tape number 12 Case number 29 03-09-99
State versus L. M.

Pros: I appear for the state Your Worship. Our investigations are complete..

Mag: Lets have the accused plead to the charge.

Int: Stand up accused. What language do you speak?

Acc: English

Int: You are L. M. You stay at house number 1888 Mochoba 12 Gweru Zimbabwe. You are unemployed. You are charged with the offence of giving false information to a person employed in the public service contrary to section 131A of the penal code. It is alleged that on the 19th day of Coctober 1998 at the Ramotswa National Registration Office in the South East Administration District, you gave false information to the Registrar of the National Registration that you were a Motswana born in Matsilobjoe village on the 21st day of November 1972, knowing that such information was false and intending thereby to cause the Registrar to issue you with a Botswana National Identity card an act the registrar would not have done if he was aware of the true state of facts.

Do you understand?

Acc: Yes'

Int: Do you plead guilty or not guilty?

Acc: Not guilty.

Pros: We are not ready with the facts Your Worship. I apply for a warrant of arrest.

Case number 30 Tape number 12 03-09 99

State versus R.B., O. S., S. S. and L. M..

Pros: (Attorney General's Chambers State lawyer) I appear for the state Your Worship. Your Worship is aware that Mr Makgabenyana was prosecuting this case and he has since left the employ of The Attorney General's Chambers and ah I've been asked to take over the matter. Now I need to meet with the investigating officer who has long retired from the public service. So I ah ask for time that I could ah liase with ... I only got this matter on Tuesday this week and I've been on leave so I'm asking for the time to afford me to link up and discuss this matter. It is as good as asking a truck driver to pilot an aircraft Your Worship and if he don't know where the bearings are he cause problems. So I am only asking for time to see what a can do and of course I also need as well apply for permission to go through the court record its self . I'm informed according to the handover note that the investigating officer was still being cross-examined. I don't know what questions he was being asked eh I believe our Worship appreciates the circumstance therefore I am asking for adjournment to a future date.

Mag: Well there is no doubt that the case has been gragging on and on.

Acc: Ke tswa kgakala ke ntse ke kopa gore kgang e e dropiwe. I remember Your Worship, when we were asked to It appears the prosecution has no case ... then we wer called again to be here on Saturday and when we got here there wa snobody. Your Worship I do feel angry because...

Pros: May I respond Your Worship to the concerns of the accused, well I can assure the accused persons that I will ensure they are prosecuted swiftly and properly. I am in the process of going through the case itself and I do understand what's involved. All I am saying is that I haven't met the investigating officer. I will meet him and this time there'll be a lot of keenness in their prosecution and they can rest assured that they will be prosecuted to the full strength of the law. There's just no doubt about that. It looks like there has been some breakdown in communication, its all systems gone bad. Thank you Your Worship.

Mag: 12TH OF October

Pros: Your Worship that will be complied with. But I wonder if the court would assist me with a charge sheet.

Mag: You will be given the charge sheet.

Pros: Thank you Your Worship.

Supplementary Data January 2000

Tape no. 1 case no. 1, 2000-03-10

READING OF CHARGE SHEET

Int: O K. D. O ngwaga di 33 .O nna ko house number 9158 ko Jinja, Gaborone. O bereka ko Roads. O lebisitswe molato wa go utswa ka dikgoka. Nne yare nako nngwe ka ene yare ka di 30 tsa October 1999 ko house number 9994 ko Jinja mo Gaborone, wa utswa ka dikgoka madi a 600 Pula mo go Martin Ikalafeng, wa mo itaya mo letlhaeng ka difeisi. Oa tlhaloganya?

Acc: Ee.

Int: O ipona molato kana ga o ipone molato?

Acc: Ke ipona molato.

Int: You are K. D. You ae 33 years old. You stay at house number 9158 at Jinja in Gaborone. You work at Roads. You are facing a charge of stealing with force. On the 30th October 1999 at house number 9994 at Jinja you stole forcefully the some of P600 from Martin Ikalafeng. You hit him with your fists in the face. Do you understand?

Acc: I do.

Int: Do you plead guilty or not?

Acc: I plead guilty)

Pros: Your Worship eh we have completed investigations. We intend to call 4 witnesses in this matter. May the case be set for trial?

Tape no. 6 2000-01-18 Case no. 4 CHARGE SHEET

Pros: Your Worship I appear for the state. The matter is scheduled for trial today and before we prceed Your Worship I would like apply to make an amendment to the charge sheet. Your Worship originally... was charged

under section 95 subsection 5 of the... Act. I'm therefore making an application that he should be charged as under section 9 subsection 4 of the Arms and Ammunition Act and to make the statement of the offence to read possession of arms for count one and possession of ammunition for count two. As a result I would like the accused to be arraigned.

Int: Emang ka dinao

(All Stand up)

Int: Mosekisiwa wa ntlha maina a gago ke K. G. o ngwaga di 22 o nna ko house number 8689 ... ga o bereke. Mosekisiwa wa bobedi maina a gago ke Talibona Makobo o ngwaga di 20 o nna ko Sebina mo kgotleng ya Makobo ga o bereke molato wa ntlha o lebisitswe molato wa go itlhelwa ka sebetsa. Ene yare ka di 23 tsaga May 1998 ko plot number 9873 ko Jinja mo kgaolong ya Gaborone o hitlhelwa ka tlhobolo eseng ka fa molaong ya nine millimetre barrel 2. loa tlhaloganya?

(First accused your names are K. G. you are 22 years old you live at House Number 8689.. you are unemployed. Second accused your names are Talibona Makobo you are 20 years old you live in Sebina at Makobo ward you are unemployed. In the first count you are charged with unlawful possession of arms. On the 23rd of May 1998 at house number 9873 at Jinja in the Gaborone district, you were found carrying a gun unlawfully, a nine millimetre barrel 2..Do you both understand?

All Accused persons: Ee

(Yes)

Int: Mosekisiwa oa ntlha oa tlhaloganya?

(Accused number one do you understand?

Acc1: Yes.

Int: O ipona molato kana ga oipone molato?

Acc1: Ee.

(Yes)

Int: O ipona molato.

(You plead guilty)

Int: O a tlhalogany mosekisiwa wa bobedi?

(Do you understand accused number two?)

Acc2: Yes.

Int: O ipona molato kana ga o ipone molato?

Do you plead guilty or not guilty?)

Acc2: Ga ke ipone molato

(Not guilty)

Int: Molato wa bobedi le lebisitswe molato wa go hitlhelwa ka marumo. Ene yare ka di23 tsaga May 1998 gaufi kgotsa ko plot number 9873 ko Jinja mo kgaolong ya Gaborone eseng ka fa molaong la hitlhelwa ka marumo a 9mm ale 19. Oa tlhaloganya mosekisiwa oa ntlha?

(Second count you are charged with unlawful possession of ammunition.

On the 23rd of May 1998 at house number 9873 at Jinja you were found carrying 19 rounds of ammunition. Do you understand accused number one?

Acc1: Ee.

(Yes)

Int: Do you plead guilty or not guilty?

Acc1: Ga ke ipone molato.

(Not Guilty)

Int: Oa tlhaloganya mosekisiwa was bobedi?

(Do you understand accused number two?

Acc2: yes

Int: O ipona molato kana gao ipone molato?

(Do you plead guilty or not guilty?)

Acc2: Ga ke ipone molato.

(Not guilty)

Pros: A point of correction Your Worship, four rounds of ammunition.

Mag: Yes.

Int: (makes the correction)

Pros: Your Worship, I'm not ready with the facts. I would therefore make an application for postponement of this matter.

Case no 6 CHARGE SHEET

Int: Le lebisitswe molato wa go utswa le le badiri oo kgatlhanong le temana yo bo 271 o balega le temana ya bo 277 ya penal code. Ene yare magareng ga November 1999 la April 1995 ko Old Naledi Industrial mo kgaolong ya bosekisi mo Gaborone

Mag: Le le badiri// **Int:** lele badiri mo Furniture Mart le bereka le le maleibara // **Mag:** Le dira mmogo ka maikaelelo// **Int:** le dira mmogo ka maikaelelo a le mangwefela le ne la utswa Gold star video machine le Panasonic video machine// **Mag:** Gold Star video machine di le tharo// **Int:** Emma. Goldstar Video machine tse tharo le panasonic tsep Panasonic video machine tse pedi le Samsung video machine tse totlhe di ne ja 10585 Pula 61 Thebe e le tsa Furniture Mart. Le tlhalogantse molato o le o libisitseng. A o ipona molato kana ga o ipone molato?

(You are facing charges of theft by employees against Section 271 read with section 277 of the penal code. Between the months of November 1999 and April 1995 at Old Naledi Industrial Site, in the district of Gaborone// **Mag:** Being employees// **Int:** being employees of of Furniture Mart working as labourers// **Mag:** acting together in concert// **Int:** acting together in concert, stole Gold Star video machine// **Mag:** Three Gold Star video machine// **Int:** Yes Ma'm three Gold Star video machines and two Panasonic video machines le Samsung video machine all valued at P10585 and 61 Thebe belonging to Furniture Mart. Have you understood the charges. Do you plead guilty or not guilty?

Int: Ka ga o a ipona molato basekisi ba tlaatla ka basupi ba le nine. (Because you have pleaded not guilty the prosecution will call nine witnesses)

Pros: Your Worship eh I'm not ready with the facts but I still have arranged for the exhibits to be collected fro

APPENDIX 8**Questions put to lawyers and Police Prosecutors**

- 1. How often do you represent people who do not speak English?**
- 2. During court sessions, do you ever use a language other than English in addressing witnesses and defendants?**
- 3. If you have answered No to question one please explain why.**
- 4. If you have answered yes, please explain why and under what circumstances.**
- 5. How do you respond to interpreting in court if it does not represent your point exactly?**
- 6. What do you think of the rule that English should be the language of the law in Botswana.**